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11(B) RESOLUTIONS FOR AMES, IA; BURLINGTON, IA; AMARILLO, TX; DALLAS, TX; AND UPPER MANHATTAN, NY

THE BUY AMERICAN ACT

(103-28)

HEARING

THE

SUBCOMMITTEE ON

PUBLIC BUILDINGS AND GROUNDS

OF THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

JULY 1, 1993

Printed for the use of the
Committee on Public Works and Transportation

U.S. GOVERNMENT PRINTING OFFICE

72-937 WASHINGTON : 1993

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-041688-4

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THE BUY AMERICAN ACT

THURSDAY, JULY 1, 1993.

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON PUBLIC BUILDINGS AND GROUNDS,
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION,
Washington, DC.

The subcommittee met, pursuant to call, at 9:00 a.m., in Room 2253, Rayburn House Office Building, Hon. James A. Traficant [chairman of the subcommittee] presiding.

Mr. TRAFICANT. The subcommittee will come to order.

This morning's agenda is very full, with six requests from Members of Congress to designate several buildings in their respective districts and five requests from Members to survey Federal space needs in their districts. The subcommittee welcomes our distinguished colleagues to today's hearing.

The subcommittee will also hear testimony from officials of the General Services Administration and the Office of Federal Procurement Policy regarding the Buy American Act and procurements conducted under this Act.

As the United States' economy is struggling to reinvigorate itself, it is important that U.S. businesses be given an equal chance to compete for American tax dollars. The Buy American Act gives preference to domestic end products in Federal procurements. The Trade Agreements Act of 1979 allows for freer trade for signatory countries and provides for sanctions for those countries which discriminate against American products.

Both of these laws have definitions regarding the origin of a product. However, these definitions are not the same and have caused confusion and concern in the Federal procurement arena. Contracting officers are forced to interpret and grapple with complex and often conflicting regulations and standards. Mistakes have been made, and American businesses have been hurt.

The subcommittee will examine the development of both of these laws and analyze the conflicting Rules of Origin. As a further step, the subcommittee may, in the future, if necessary, consider a legislative remedy.

I would like to at this time move forward and welcome the fine Ranking Member of the Appropriations Subcommittee on Treasury, Postal Service, the Honorable Jim Lightfoot from Iowa.

TESTIMONY OF HON. JIM LIGHTFOOT, A REPRESENTATIVE IN CONGRESS FROM IOWA

Mr. LIGHTFOOT. Good morning Mr. Chairman. Thank you for giving me the opportunity to testify today.

I have two 11(b) requests that I would like to make. And it has been a pleasure working with you, Mr. Chairman, over the years since we both came in together in the same class, and we have had our share of fun, and I hope we have some more as time goes on.

The two 11(b) requests are not large but carry importance to their respective communities. The first request is on behalf of the City of Ames, Iowa, which is now part of my congressional district as a result of the redistricting plan.

Ames is the home of Iowa State University, a community of a little under 50,000 people. There are a number of Federal agencies housed in various places and no Federal building, so they are scattered all over the community. There is a post office. This in the past has housed many of the agencies, but the facility is not handicapped accessible, and is in bad need of renovation. I understand that all but one Federal agency now has moved out of the post office.

When I first surveyed Ames in search of a location for our office we looked at the post office and decided against it because handicapped people cannot get into the building.

I don't believe the Postal Service has plans to renovate the building at this time. Therefore, I feel an 11(b) study would shed light on the possible need for a Federal building in the city, a need which I think is real and exists.

The second 11(b) request I would like the subcommittee to consider is for the town of Burlington, Iowa. The city has four Federal agencies housed within a three-block area of the downtown; yet there is almost no parking available anywhere in the area. A parking facility is desperately needed there.

It is an old river town, started on the Mississippi River and built back as many river towns did. And today they are fighting for their lives as the crest on the Mississippi is headed towards them.

We have provided funding for the facility at a level of $2.4 million in the fiscal year 1994 Treasury, Postal Service and General Government appropriations bill, subject to authorization.

I urge the committee's support for this project.

Thank you, Mr. Chairman.

Mr. TRAFICANT. We are glad to have you here, Mr. Lightfoot. We are looking into your requests and very positively.

I would like to defer to the Ranking Member, Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman. I am a little out of breath because my office is about as far away from here as an office can get.

I want to welcome our good friend, Congressman Lightfoot, and we certainly will try to give your requests the consideration that I know that we should.

I don't really have a formal statement. I just would like to welcome the witnesses that are here to give testimony in support of 11(b) requests and naming bills and to speak on an important issue for every American worker, the Buy American Act that I know you are so interested in, and I am also, and all of us are looking forward to this hearing.

We want to do what we can to promote jobs and employment in this country, and I will have more to say about that later. But, as the Washington Times pointed out last year in a story on this issue, it said, baseball may be the national pastime, but when Uncle Sam needed slugger baseball bats he bought them from a Canadian contractor.

That points up the problem that we will get into in this hearing later. Our own Federal government is buying all kinds of products from companies in other nations, so we need to promote Buy American policies when we can. I will have more to say about some of these things later.

Again, thank you for coming this morning.

Mr. TRAFICANT. We wouldn't have known about those Canadian sluggers were it not for you, Mr. Duncan. We thank you for that.

Our fine, outstanding Member in the District who was so worked up yesterday, perhaps you want to make a statement today.

Ms. NORTON. I want to thank Congressman Lightfoot for his testimony.

Mr. TRAFICANT. Chairman Applegate.

Mr. APPLEGATE. I have no statement. It is always great to see Jim Lightfoot either here or on the Floor, and we will certainly take a look at your request.

Mr. TRAFICANT. I assure you we will consider your concerns in swift dispatch and thank you for being here.

Mr. LIGHTFOOT. Thank you, Mr. Chairman.

Mr. TRAFICANT. The Honorable Bill Sarpalius from Texas, a friend. We give you the Floor, Bill.

TESTIMONY OF HON. BILL SARPALIUS, A REPRESENTATIVE IN CONGRESS FROM TEXAS

Mr. SARPALIUS. Thank you, Mr. Chairman. I appreciate the opportunity to testify before your committee. I have written testimony that I would request be added for the record.

Amarillo has a Federal building that houses the U.S. District Court, the FBI, the IRS, the Railroad Retirement Board, the Border Patrol and other agencies. Many Federal agencies in Amarillo lease office space due to lack of space within the Federal building. These agencies include the Bureau of Mines, Social Security Administration, Soil Conservation Service, the Agricultural Stabilization and Conservation Service, the Bankruptcy Court and possibly many others.

My district office is leased outside of the Federal building because of lack of space, and I might add that I can lease space cheaper than I can in the Federal building.

There are many vacant office buildings in Amarillo, and I would like to request that the GSA conduct a building survey to determine if the present arrangement is cost-effective.

Mr. Chairman, I thank you for the time today. If I may provide any further information please let me know.

[Mr. Sarpalius' prepared statement follows:]

Testimony of Rep. Bill Sarpalius
before the
Subcommittee on Public Buildings and Grounds
July 1, 1993

Chairman Traficant, I would like to thank you and the members of the subcommittee for affording me an opportunity to come before you today to discuss Federal office space in Amarillo, Texas.

Amarillo has a Federal Building at 205 East 5th Avenue. At present, this building houses the U.S. District Court, the Federal Bureau of Investigation, the Internal Revenue Service, the Railroad Retirement Board, the Border Patrol, the Farmers Home Administration district office and other agencies.

Other Federal agencies located in Amarillo lease office space scattered throughout the city. These agencies include the Bureau of Mines, Soil Conservation Service, Agriculture Stabilization and Conservation Service, Farmers Home Administration, the Social Security Administration, the U.S. Bankruptcy Court and possibly others of which I am unaware. I also lease office space for my district office.

There are many existing vacant office buildings in the downtown area of Amarillo in the near vicinity of the existing Federal building. As we are currently attempting to cut wasteful government spending, I am interested in determining whether it would be cost effective to house all the Federal agencies at one location. For this reason, I respectfully request that your subcommittee consider asking the General Services Administration to conduct a building survey in Amarillo, Texas.

Again, Mr. Chairman, thank you and the other members of the subcommittee for your time today. If I may provide further information, please let me know.

Mr. TRAFICANT. Mr. Duncan.

Mr. DUNCAN. I have no questions. I thank our good colleague for being here with us this morning.

Mr. TRAFICANT. Ms. Norton?

Ms. NORTON. I am interested, the Congressman said he could lease space cheaper outside the Federal building which we own.

Mr. SARPALIUS. That is correct.

Ms. NORTON. That would interest me at a later time to try to understand how that occurred, because the whole move to own Federal buildings, which is something the committee has long stood for, is, suffice it to say, to save money. So I am pleased that you mentioned that because it interests me, and I think the committee ought to see if there is a pattern around the country.

Mr. SARPALIUS. The Federal building that we have in Amarillo is full. It is a problem within the city. We have Federal offices—especially the Social Security Office—that have moved several times. They are scattered throughout the city.

I would like to see if it might be more cost-effective to lease a building or see if we can't do a more efficient job than we are doing now.

Mr. TRAFICANT. Mr. Applegate.

Mr. APPLEGATE. No questions.

Mr. TRAFICANT. I would like to echo the concerns of Ms. Norton, but I am sure that those questions can be answered for us. But that would be a significant bearing on the matter.

Thank you, Mr. Sarpalius.

Mr. SARPALIUS. Thank you, Mr. Chairman.

Mr. TRAFICANT. The committee would now like to welcome the gentlewoman from Florida, Ms. Corrine Brown. Welcome. The Floor is yours.

TESTIMONY OF HON. CORRINE BROWN, A REPRESENTATIVE IN CONGRESS FROM FLORIDA

Ms. BROWN. Thank you, Mr. Chairman. Thank you, committee. It is an honor for me to be here today, and it is also a pleasure to appear before the committee on behalf of H.R. 2431, legislation I introduced to designate the Federal building in Jacksonville, Florida, as the Charles E. Bennett Federal building.

Congressman Bennett retired at the end of the 102d Congress after serving 44 years in the United States Congress. I have the privilege of representing a large portion of Mr. Bennett's old district, and, as you can imagine, I have very large shoes to try to fill.

I have always considered Charlie Bennett to be a great American hero and a person whose career I have attempted to use as a benchmark for my own. For those of you fortunate enough to know him, Charlie Bennett is a fine example for all of us to follow.

Mr. Chairman, you along with six Members of this subcommittee served with Charlie Bennett in Congress, so I don't need to tell you why he is so deserving of this honor.

The people of Jacksonville extremely appreciate the 44 years Congressman Bennett represented us here, and there is no way that we can really repay him, but this is a small token for a person that has dedicated himself for so long and has done so much.

Mr. TRAFICANT. I concur with that. Not only the people of Florida are proud of those 44 years, all the people of America are very pleased and honored to have the services of Mr. Bennett. We appreciate your bill.

[Ms. Brown's prepared statement and the bill H.R. 2431 follow:]

Testimony before the
House Public Buildings and Grounds Subcommittee
by the
Honorable Corrine Brown
July 1, 1993

Mr. Chairman, it is indeed a pleasure to appear before you today on behalf of HR 2431, legislation I introduced to "designate the federal building in Jacksonville, Florida as the Charles E. Bennett Federal Building."

Congressman Bennett retired at the end of the 102nd Congress after serving 44 years in the United States Congress. I now have the privilege of representing a large portion of Mr. Bennett's old district and as you can imagine, I have very large shoes to fill!

I have always considered Charlie Bennett to be a great American hero and a person whose career I have attempted to use as a benchmark for my own. For those of us who are fortunate to know him, Bennett is a fine example to follow.

Mr. Chairman, you, along with six members of this subcommittee served with Charlie Bennett in Congress, so I do not need to tell you why he is so deserving of this honor. However, if you will allow me, I would like to mention a few of the notable accomplishments which mark his tremendous career.

Congressman Bennett was elected to Congress in November, 1947 and has the ninth longest record of continued service in the U.S.

Congress. He answered over 17,000 recorded votes and did not miss a single legislative vote from June 5, 1951 through to the day of his retirement. As many of you know, Mr. Bennett came to Congress following four years of service in the Army during World War II. He contracted polio during the war and has been forced to use walking canes ever since. During his first campaign, some questioned his health and wondered whether he was physically able to meet his Congressional responsibilities. In fact, Mr. Bennett was hospitalized several times during his first Congressional term. But in the summer of 1951, with his medical difficulties behind him, Bennett decided that the best way to prove his physical abilities, mental resolve and commitment to the job to which he was elected, was to promise himself never to miss a legislative vote -- and it was a promised he kept!

Mr. Bennett is a man of honor and integrity and left a legacy behind to prove it! His legislation created the House Ethics Committee -- which he twice chaired. In addition, he authored the Code of Ethics for Government Service and other legislation in the area of government ethics. His legislation also made "In God We Trust" our national motto.

Bennett was also a champion of this Country's Armed Forces. He believed, and still does, that our fighting men and women deserve the best equipment and training necessary to fulfill the missions

to which they are assigned.

As Chairman of the House Armed Services Subcommittee on Seapower, Bennett fought to enhance America's sealift capacity and enhance our U.S.-flagged fleet. In Jacksonville, Mr. Bennett is thought of as the father of the Navy. He worked to turn Mayport Naval Station, a surplus military facility when Bennett was elected to Congress, into a aircraft carrier homeport and the second largest such port on the East Coast. In addition, he successfully succeeded in securing three naval air stations in Jacksonville.

But Mr. Bennett's first love is the environment. Last year, he was quoted as saying, "I love the outdoors. It is closest to God you can get while still on Earth." Because of his desire to protect this Nation's natural and historic resources for future generations, Bennett authored and secured the passage of national legislation to preserve historic sites and treasure ships and protect endangered species and ecologically sensitive sites. His legislation also created the Ft. Caroline National Memorial and the Timucuan Ecological and Historic Preserve in Jacksonville. Putting his money where his mouth is, Bennett also donated all of his excess campaign funds -- over $200,000 -- to the National Park Service for the purpose of land acquisition.

If there you think all this makes Charlie Bennett a hero -- you are correct. But he was already a hero when he got to Congress. As

an Army Captain, Mr. Bennett led guerilla fighters in the Phillipines in the Northern Luzon mountains and was awarded the Silver Star for gallantry in action. The Phillipines decorated him with the Legion of Honor, the highest award for a non-Filipino. He was elected to the Infantry Hall of Fame by the Fort Benning Officer Candidate School.

It is fair to say that no public official has done more for the city of Jacksonville than Charlie Bennett. In fact, few members of Congress have done more for this institution than Charlie Bennett. He has been a tireless public servant and I admire him greatly.

Mr. Chairman, as you can tell, I think a great deal of Charlie Bennett and hope that you will join me in giving him the honor of designating Jacksonville's federal building as the "Charles E. Bennett Federal Building." I only wish I could name a whole block after him!

Thank you.

Congressman

Charlie Bennett

Congressman Charles E. Bennett is Chairman of the Seapower Subcommittee of the House Armed Services Committee and also a member of the Research and Development Subcommittee. He is a member of the Merchant Marine, Coast Guard, and Oceanography Subcommittees of the House Merchant Marine and Fisheries Committee. He is the Dean of the Florida Delegation to Congress.

Bennett has set an all-time voting record in Congress. He has answered nearly 17,000 recorded votes. He has not missed a single legislative vote since June 5, 1951.

He authored the Code of Ethics for Government Service and other legislation in the area of government ethics. The Jacksonville Congressman has twice been Chairman of the House Ethics Committee; and his legislation created that Committee. His legislation made "In God We Trust" our national motto.

Bennett has been the principal author of important environmental, conservation, and national park legislation, including the Fort Caroline National Memorial and Timucuan National Ecological Preserve, and national legislation to preserve historic sites and treasure ships. He received the Izaak Walton League Award for "Outstanding Conservation Accomplishments."

The veteran lawmaker's successful military legislation provided needed ships for the Navy, advances in military pay for all services, military justice reform, and improved military housing. His legislation also established a scholarship program for doctors for the Armed Forces. He authored legislation creating the Arms Control Agency and legislation allowing the military services to assist in interdicting drug smugglers.

Bennett has authored and enacted legislation in the areas of anti-crime, auto safety, federal aid to education, and improvements in government efficiency and economy. He has been awarded the "Distinguished Service Award," the highest honor given by the President's Committee on Employment of the Handicapped, this for vocational rehabilitation legislation. He authored legislation to require buildings to be accessible to the handicapped.

Bennett has received six "Watchdog of the Treasury Awards" from the National Associated Businessmen for his strong support of fiscal responsibility in government. He also received the "Minuteman of the Year Award" from the Reserve Officers Association, and he was selected by the Non-Commissioned Officers Association for its highest award for legislative action. The Navy League gave him the highest award for civilian service to the military. The National Conference of Christians and Jews in 1989 awarded him its "Brotherhood Medallion."

Bennett practiced law in Jacksonville before election to Congress and was active in civic affairs. He served as President of the Jacksonville Jaycees and in the Florida House of Representatives in 1941. He served as President of the national University of Florida Alumni Association.

During WWII, he led guerrilla fighters in the Philippines in the Northern Luzon mountains and was awarded the Silver Star for gallantry in action. The Philippines decorated him with the Legion of Honor, the highest award for a non-Filipino. He was elected to the Infantry Hall of Fame by the Fort Benning Officer Candidate School.

Bennett has served in the U.S. House of Representatives since 1949 and represents the Third District of Florida which includes most of Duval County and all of Nassau County. He and Mrs. Bennett have three children, and he is an elder in the Riverside Avenue Christian Church in Jacksonville.

I

103D CONGRESS
1ST SESSION

H. R. 2431

To designate the Federal building in Jacksonville, Florida, as the "Charles E. Bennett Federal Building".

IN THE HOUSE OF REPRESENTATIVES

JUNE 16, 1993

Ms. BROWN of Florida (for herself, Mr. MINETA, and Mr. TRAFICANT) introduced the following bill; which was referred to the Committee on Public Works and Transportation

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A BILL

To designate the Federal building in Jacksonville, Florida, as the "Charles E. Bennett Federal Building".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DESIGNATION.

The Federal building at 400 Bay Street in Jacksonville, Florida, is designated as the "Charles E. Bennett Federal Building". If a new Federal building is built in Jacksonville, Florida, to replace the building at 400 Bay Street, the new Federal building shall be designated as the "Charles E. Bennett Federal Building".

SEC. 2. LEGAL REFERENCES.

Any reference in any law, regulation, document, record, map, or other paper of the United States to the Federal building referred to in section 1 is deemed to be a reference to the "Charles E. Bennett Federal Building".

Mr. TRAFICANT. Mr. Duncan?

Mr. DUNCAN. I will simply say that this is something that I am pleased Miss Brown is doing. Charlie Bennett is a fine man and certainly served the House with great distinction, and he was a man who was loved and respected on both sides of the aisle, and I think this is very appropriate.

It is becoming almost unheard of to stay for a long time. I think the average Member stays 6 years. I guess the day of people serving a long time in the House is probably getting to be a thing of the past. But 44 years, 22 terms, it is amazing to think of somebody being elected that many times. I certainly would support this bill.

Mr. TRAFICANT. Ms. Norton.

Ms. NORTON. Miss Brown, I appreciate your coming forward. Anybody who knew Charlie in this House, and most of us did, understand precisely why you have come forward to make this recommendation, and I strongly support it.

Mr. TRAFICANT. Mr. Applegate.

Mr. APPLEGATE. I would like to compliment you. I thought that was a beautiful tribute that you paid Charlie.

It is hard to imagine anybody would stay here that long. With everybody wanting to put terms limits in, we may be here a lot shorter than that period of time.

I think a lot of people don't know—of course, we give Bill Natcher a great deal of credit for being here as long as he has and not missing a vote. Charlie Bennett served 44 years and missed one vote in 44 years. That was because of a mistake. Otherwise, he would have 44 years—he would have that many years of a clean slate, too.

You say you have large shoes to fill. Yes, you do. But you don't fill anybody else's shoes. I know you will have your own set of shoes and make your own mark and 44 years from now we will name one after you.

Mr. TRAFICANT. I want to echo the comments of all.

As Chairman Applegate said, Mr. Bennett was a great Member, and the committee will look favorably on that.

You also have started out well. I think it was a great tribute you made to Mr. Bennett, and we are glad to have you here as well. We will consider your matter.

Ms. BROWN. I would like to place my entire message in the record. I note that it took three Congress people to replace Congressman Bennett.

Mr. TRAFICANT. Without objection so ordered. Thank you. We appreciate your testimony.

We will now go to the witnesses on the Buy American issue. We may have some Members that may come in, and we may suspend to accommodate some of these Members.

I would like to call Mr. Richard Hopf, Associate Administrator, Office of Acquisition Policy, General Services Administration, and Mr. Edward McAndrew, Acting Director, Office of Acquisition Policy, General Services Administration.

TESTIMONY OF RICHARD H. HOPF, ASSOCIATE ADMINISTRATOR, OFFICE OF ACQUISITION POLICY, GENERAL SERVICES ADMINISTRATION, AND EDWARD McANDREW, ACTING DIRECTOR, OFFICE OF ACQUISITION POLICY, GENERAL SERVICES ADMINISTRATION

Mr. TRAFICANT. I would like to welcome you both and give you the opportunity to testify.

Mr. HOPF. I will go first.

I am Richard Hopf, and I am happy to be here this morning.

I know the committee has a busy agenda. I have prepared testimony for the record I would like to submit. We can go directly to questions that you may have or I can quickly summarize it.

Mr. TRAFICANT. I ask unanimous consent that their official statements be placed in the record. If you would summarize, we can get to the questions, and we would appreciate that.

Mr. HOPF. Mr. Chairman, Members of the committee, thank you for inviting me here today to talk about the Buy American Act, a very important piece of legislation for the United States.

The Buy American Act was enacted over 60 years ago to establish a general preference for the acquisition of domestically produced articles, materials and supplies when they are purchased by the government for public use in the United States. The Buy American Act was a product of the Depression era and was intended to save and create jobs for American workers and to protect domestic industry.

The Buy American Act appears to have been, at least in part, a retaliatory measure against other measures put into place by other nations at the time.

The Buy American Act has separate provisions applicable to supply and to construction contracts. Both provisions focus on the place of production or manufacture as opposed to the nationality of the producer or contractor.

Under supply contracts, the requirements of the BAA apply to those things directly purchased by a Federal agency. In construction contracts, they apply to the construction materials purchased by the Federal contractor or subcontractor and brought to the site.

With respect to supplies, the Buy American states that unmanufactured articles or materials purchased for public use in the United States must have been mined or produced in the United States. Manufactured articles, material and supplies purchased for public use must have been manufactured in the United States substantially all from components that have themselves have been mined, produced or manufactured in the United States.

With respect to construction, the Buy American Act directs Federal agencies to include a contract clause in construction and repair and alteration contracts which places similar requirements on contractors and subcontractors.

In enacting the BAA Congress recognized certain exceptions to its application. Those exceptions relate to the unavailability of domestic product, the unreasonable cost of domestic product and public interest exceptions.

Buy American has been implemented by executive order as well as by internal administrative regulations. Its application over the years has been subject to quite a bit of litigation. It is a rather

complex assessment that has to be made in each procurement to which the Buy American Act has been applied.

Additionally, over the years we have seen a proliferation of other forms of legislation to protect the domestic economy. At the same time we have seen other legislation to provide free and fair trade. The entire situation for procurement folks is some what difficult and presents us with many challenges.

With that, Mr. Chairman, I would be happy to answer any questions you might have.

Mr. TRAFICANT. Mr. Hopf, we are going to ask that we briefly suspend taking up your questions. We are going to attempt to accommodate a couple of Members who have come in.

If we could suspend briefly at this time I would like to accommodate the testimony, and we can get back to the questioning.

I would like to call a fine representative of the Rules Committee, Representative Alan Wheat of Missouri.

Good to see you Alan. Thank you for being here. We are glad you were able to make it.

TESTIMONY OF THE HON. ALAN WHEAT, A REPRESENTATIVE IN CONGRESS FROM MISSOURI

Mr. WHEAT. Mr. Chairman, I appreciate being here, though you make me question my choice of the Rules Committee when I see Members who have come since I arrived in Washington some 11 years ago who chair this fine committee. I appreciate the fact that you are here because you have been so helpful on other legislation.

This, frankly, is not the most monumental piece of legislation that I am introducing, but it is an appropriate tribute to a person who I believe was one of the more monumental legislators that has ever served in this body, my predecessor in the Congress and a former Chairman of the Rules Committee himself, the Honorable Richard Walker Bolling. Mr. Bolling was elected originally in 1948 and served for 34 years in the House of Representatives, ultimately serving as Chairman of the Rules Committee.

His 17-term career was a notable one. He is recognized in many places as one of the true architects of real reform in the House of Representatives, but I think perhaps what he was proudest of in his career was the fact that he was the Architect of the 1957 Civil Rights Act, the first civil rights act to pass the Congress since the Reconstruction era.

He was generally regarded as one of the masterminds of the House of Representatives. He was also the mastermind of creating not only the Federal building that we hope to name after him in Kansas City but the Federal regional concept itself.

We think it would be a fitting and proper tribute to name the building for which he worked in Kansas City and help establish the Richard Bolling Federal building.

[H.R. 2559 follows:]

I

103D CONGRESS
1ST SESSION

H. R. 2559

To designate the Federal building located at 601 East 12th Street in Kansas City, Missouri, as the "Richard Bolling Federal Building".

IN THE HOUSE OF REPRESENTATIVES

JUNE 29, 1993

Mr. WHEAT introduced the following bill; which was referred to the Committee on Public Works and Transportation

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A BILL

To designate the Federal building located at 601 East 12th Street in Kansas City, Missouri, as the "Richard Bolling Federal Building".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DESIGNATION.

The Federal building located at 601 East 12th Street in Kansas City, Missouri, shall be known and designated as the "Richard Bolling Federal Building".

SEC. 2. REFERENCES.

Any reference in a law, map, regulation, document, paper, or other record of the United States to the Federal

building referred to in section 1 shall be deemed to be a reference to the "Richard Bolling Federal Building".

Mr. TRAFICANT. Representative Duncan.

Mr. DUNCAN. Thank you for coming today. I know that Congressman Bolling was a well-respected Member, and your request will be met with a very positive stance from this side of the aisle, I can tell you that.

Mr. WHEAT. I appreciate that. Mr. Bolling was a Member of Congress in a different era when perhaps partisan tensions were not so high, but he always advised me that in order to get anything done in this Congress, both sides had to work together, and I wish those were lessons that we took more to heart now.

Mr. TRAFICANT. Ms. Norton.

Ms. NORTON. I strongly support your request. Richard Bolling was an historic figure in the Congress and a Congress where it is difficult to stand out in the way in which he has done. I am sure many Members will appreciate the notion that you brought forward of naming a Federal building for him.

Mr. TRAFICANT. Chairman Applegate.

Mr. APPLEGATE. I would support that like I would a building for Charlie Bennett.

Dick Bolling, I served with him for several years. And I remember my first term when I came in he got into a pretty hotly contested race with Jim Wright and Phil from California—Phil Burton, the three of them. And, of course, Dick ended up on the short end of the stick on that one, and I didn't support him on that and told him I wouldn't be able to.

There wasn't anybody that I held in higher esteem than he. He was the ultimate parliamentarian. He knew the rules. He knew how to operate probably better than anybody else. He was always considered as the intellect of the House and a pragmatist. He was a Member people looked up to, and I think the choice of naming a building for Dick Bolling is a good one.

Mr. TRAFICANT. I didn't have the pleasure of serving with Dick Bolling, but I have had the pleasure of serving with you. I think it is a great tribute and your community has carried on with great continuity with you representing that area, and we will seriously look into this issue and I am sure positively dispatch it.

Mr. WHEAT. Thank you, Mr. Chairman. I appreciate your consideration.

Mr. TRAFICANT. I would like to call the Honorable Rob Portman, our colleague from Ohio.

TESTIMONY OF HON. ROB PORTMAN, A REPRESENTATIVE IN CONGRESS FROM OHIO

Mr. PORTMAN. Thank you, Mr. Chairman. I am here today also to discuss the naming of a building, and I appreciate the opportunity to allow me to appear.

This is on behalf of H.R. 2555 which would designate the United States Post Office and Courthouse in Cincinnati, Ohio, as the Potter Stewart United States Courthouse Building in honor of the late Associate Justice to the Supreme Court, Potter Stewart.

Justice Stewart was a native of Cincinnati. Like his father, James Garfield Stewart, a former mayor Cincinnati and a member of the Ohio Supreme Court, Potter Stewart devoted his life to serving his city and his country. Justice Stewart saw active duty in the

U.S. Navy. During World War II he served on the Cincinnati City council and was vice-mayor of the city.

In 1954, he was named by President Eisenhower to the United States Court of Appeals for the Sixth District, which resides in the U.S. Post Office and Courthouse Building in Cincinnati. At age 39, Mr. Stewart was the youngest Federal judge in the country.

Following the retirement of Associate Justice Harold M. Burton, President Eisenhower appointed Judge Stewart to the Court during a congressional recess in 1958, permitting him to join the Court before the Senate confirmed him later that year. At age 43, he was the second youngest Supreme Court appointee since the Civil War. Justice William Douglas was 40 when he was appointed in 1939.

Justice Stewart served on the Court for 23 years. His philosophy was not one marked by ideology but by adherence to the principles of the Constitution. He stressed that a judge's job was to be objective, conscientious, diligent and to remember that everyone is equal before the law. He once said, I think it is the first duty of the justice to remove his own moral, philosophical and religious beliefs and not to think of himself as a great philosopher king and to apply his own ideology.

Mr. Stewart was neither a champion of the political left nor of the political right. He focused on the merits of a case but shunned broad social and economic interpretations of the law. He was praised by civil libertarians for his support of the First Amendment principles of free speech and freedom of the press. Conservatives commended him for his acceptance of prayer in school and for backing prosecutors and police in many criminal justice cases.

Upon his death in 1985—four years after his retirement from the bench—Justice Stewart was praised by President Reagan as a "patriot and a good lawyer—indeed—a brilliant man of the law." Then Vice President Bush called Justice Stewart "an outstanding man who was a symbol of decency and honor. He was a constitutional scholar who interpreted the Constitution without succumbing to the temptation to legislate from the bench."

Mr. Chairman, I want to thank you for receiving this testimony and hope the subcommittee will favorably consider H.R. 2555. I believe enactment of this bill would be an appropriate symbol of recognition for this highly distinguished man who had a highly distinguished career, a son of Cincinnati who served but one master, the Constitution of the United States.

[H.R. 2555 follows:]

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103D CONGRESS
1ST SESSION

H. R. 2555

To designate the Federal building located at 100 East Fifth Street in Cincinnati, Ohio, as the "Potter Stewart United States Courthouse".

IN THE HOUSE OF REPRESENTATIVES

JUNE 29, 1993

Mr. PORTMAN introduced the following bill; which was referred to the Committee on Public Works and Transportation

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A BILL

To designate the Federal building located at 100 East Fifth Street in Cincinnati, Ohio, as the "Potter Stewart United States Courthouse".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DESIGNATION.

The Federal building located at 100 East Fifth Street in Cincinnati, Ohio, shall be known and designated as the "Potter Stewart United States Courthouse".

SEC. 2. REFERENCES.

Any reference in a law, map, regulation, document, paper, or other record of the United States to the Federal building referred to in section 1 shall be deemed to be

a reference to the "Potter Stewart United States Courthouse".

Mr. TRAFICANT. Mr. Duncan.

Mr. DUNCAN. I would like to thank Rob for coming here this morning.

As some of the Members of this subcommittee know, I was a circuit judge for seven and a half years in Tennessee before coming to Congress, and I have read many of Justice Stewart's decisions. He was a well-respected member of the Supreme Court, and I think it is very appropriate—in fact, I am surprised that this hasn't been done before now. It is certainly something I would support. And thank you very much for coming here.

Mr. TRAFICANT. Mrs. Norton.

Ms. NORTON. Representative Portman, anyone who followed the work of the Court during the period when Potter Stewart served will understand why this is a well-deserved honor. I agree with the Chairman. It is amazing that it has not come before. Not many cities or districts have a native son who served so ably on the United States Supreme Court.

Mr. TRAFICANT. Chairman Applegate.

Mr. APPLEGATE. Thank you for coming before the committee.

It is true that Justice Stewart distinguished himself with a very long and illustrious career. Everybody recognized Potter Stewart for his support for strong law enforcement. That is a very important point. I think that naming the building after Justice Stewart is a very good idea, and I appreciate you coming before the committee and bringing that to us.

Mr. TRAFICANT. I want to echo the comments made by all here, Rob. We wish you the best as you dispatch your new duties, and we will consider your request seriously.

We would like to reconvene our hearing with Mr. Hopf and Mr. McAndrew. We apologize for these disruptions, but as the Congress closes out here before this break it is a little hectic. We appreciate your tolerance and forbearance.

Mr. Hopf and Mr. McAndrew—Resumed

Mr. HOPF. That is all right, Mr. Chairman. Unless Mr. McAndrew is in a talkative mood this morning, I think we can move right to your questions.

Mr. TRAFICANT. Mr. Duncan.

Mr. DUNCAN. Mr. Hopf, let me start off by just asking you this.

I referred earlier to an article in the Washington Times, and it mentions in this article how difficult it is to unravel—it says, how difficult it is to unravel the details on a purchase by an unnamed Federal agency. And it seems that so many of these things are discovered after the fact. Our office was contacted last year by the U.S. Quilting Society, and we found that the Smithsonian Institute was buying quilts from China instead of from the Native American quilters and other historical societies that we have in this country. I could go on and on with many, many examples.

We have had this Buy American Act, you said, for 60 years. The Chairman has added that type of an amendment to many bills that we have had before us in recent years, and it seems that there is real strong support in the Congress for encouraging Buy American type activities by our government, and yet we continually run into these things over and over again. Why is that, in your opinion?

Mr. HOPF. There are probably a number of reasons for that, Congressman. I would probably suggest that there are two that are dominant.

First of all, although the Buy American Act is certainly a general preference for the purchase of domestic products, it is not an absolute preference. It does recognize a number of exceptions.

Probably the most significant for our discussion is an exception based upon a determination of whether a domestic item is offered at a reasonable cost as compared to an offered foreign item. This has been implemented by executive order to translate to the application of a price differential that is applied to a foreign bid when compared to a domestic bid. If the domestic bid in comparison to the foreign bid with the differential added is still more expensive then we are directed to purchase the foreign item.

The second reason that you probably see those types of articles is that, notwithstanding the currency of the Buy American Act, there are other statutes in place which have as their purpose the equalization of trade between our country and our trading partners, that is a reduction of barriers between our trading systems.

The most significant of those pieces of legislation would be the Trade Agreements Act enacted in 1979 to implement a number of international agreements that have that harmonizing of trade and the reduction of barriers as their primary purpose.

Mr. DUNCAN. Do you think that the exceptions outweigh the rule, that the exceptions are so easily applied that most people in positions of power with regard to purchases and so forth really don't have to seriously consider the Buy American Act or Buy American provisions in other legislation?

Mr. HOPF. No, they certainly have to very seriously consider it, sir. I think if there was an observation to be made it would be that, particularly with respect to the determination of unreasonable cost, the differential is not a great differential for civilian agencies.

It is a 6 percent differential. When you apply that differential there is not a lot of discretion that is applied by contracting officers. It is pretty much a straight mathematical calculation.

Mr. DUNCAN. How widespread is this practice of buying products from companies from other nations? In other words, do you think that a large percentage of goods that the government is purchasing are coming from companies, from overseas or companies from other countries?

I suppose, too, it is hard to tell now because so many companies here are owned by stockholders or owners from other nations.

Mr. HOPF. Yes, sir. That is a very good point.

Your question really gets into two areas, the question of how much do we buy from foreign companies as distinguished from the question of how many foreign products do we buy. Buy American has no relationship to the nationality of the company or the offeror. It only relates to the origin of products.

I have no statistics one way or the other to go over with you, but looking at it from the standpoint of the General Services Administration, the majority of the products that GSA buys, even though many of our procurements are subject to the Trade Agreements Act which waives Buy American, is of domestic origin.

Determining whether something is of domestic origin is of course an extremely complex activity under the Buy American Act, and one can get into arguments as to whether a particular item should or should not be considered domestic, and one can get into arguments as to whether a particular item from a domestic manufacturer, that is one coming from a U.S. National origin, whether that should be considered an American product.

Mr. DUNCAN. How is the Buy American Act administered? Do you rely on certification from a supplier?

Mr. HOPF. Yes, sir.

Mr. DUNCAN. Do you know of any instances where that certification has been questioned?

Mr. HOPF. Yes, sir.

Mr. DUNCAN. Is that common or uncommon?

Mr. HOPF. As a general rule, it is probably the exception that we identify a certification that is inaccurate or false or in any way misrepresents the truth.

Mr. DUNCAN. Do you know of any examples that you can think of where that certification has been questioned?

Mr. HOPF. Yes, sir. Just looking at it from the General Services Administration's standpoint, although I can't remember numbers specifically, we have had a number of cases in which certifications, when we looked behind them and looked at the facts, turned out not to be accurate. That is, an item that may have been represented as a domestic item was not a domestic item once you applied the two-tiered Buy American test for determining origin.

Mr. DUNCAN. What do you do when that happens? If you find a company that has given a certification that you find to be false or inaccurate, is there action taken? Do you stop dealing with that company?

Mr. HOPF. That is an available option. By the law we can take an action against a company that has falsely certified. We can exclude them from government contracts. GSA has done that.

Mr. DUNCAN. You can, but has that ever been done?

Mr. HOPF. Yes, sir. GSA has done that in a number of instances.

Mr. DUNCAN. Can you give me specific examples——

Mr. HOPF. The one that comes to mind—we had a situation where we were getting a tool that was coming into GSA and it was represented as domestic. If I remember correctly what happened in that case was the contractor had taken major metal componentry in the tool and had overstamped a made in whatever the country was, a foreign country, overstamped that with made in the USA.

In that case, it appeared to be a clear falsification of statement to the United States. If I remember correctly, that company was debarred by GSA.

Mr. DUNCAN. I will yield to other Members.

Mr. TRAFICANT. Before we go on, I would like to ask that you submit that data to us, any investigative information you have.

I am going to ask to suspend the hearing now. I will ask Representative Combest from Texas to come up. You can stay right there, and you can be honored to be next to a fine Congressman, Representative Combest. These guys from GSA are going to help you out.

TESTIMONY OF HON. LARRY COMBEST, A REPRESENTATIVE IN CONGRESS FROM TEXAS

Mr. COMBEST. Thank you, Mr. Chairman. I appreciate very much your working me in.

Mr. Chairman, I would like to thank you for calling this hearing, and I appreciate your prompt consideration of H.R. 2532. I introduce this measure to designate the Federal Building and U.S. Courthouse in Lubbock, Texas, as the George H. Mahon Federal Building and Courthouse.

As many of you may know, the late Representative George Mahon was elected to the newly created Texas' 19th Congressional District in 1934 and was reelected to the 21 succeeding Congresses until his retirement in 1979.

During his tenure in Congress, he served with eight presidents and rose to be the Chairman of the House Appropriations Committee. He served continuously in that position longer than any other man in the 128-year history of the committee. At the time he announced his retirement, he was also dean of the Congress.

It is difficult to drive through the spacious 20-county region which encompasses the 19th District of Texas without noting the legacy of George Mahon. Throughout his distinguished 44-year congressional career, Mahon's leadership for his district, State and Nation served as a role model for all other Members of Congress to try to follow.

It is a privilege to author this measure naming the Federal Building and U.S. Courthouse in Lubbock, Texas, in his honor. I believe it to be an appropriate tribute to the legacy of George Mahon to name the 19th District's only Federal building, which is also located in his adopted hometown of Lubbock, after its former revered Congressman.

Quite frankly, there would be no Federal Building and U.S. Courthouse in Lubbock without George Mahon. It was his dedicated work and leadership in Congress that brought the Federal Building to Lubbock. It is only fitting that this building be designated to bear his name.

Mr. Chairman, on behalf of my constituents in the 19th District of Texas, I respectfully request your positive consideration of this measure and appreciate your time.

Mr. TRAFICANT. Mr. Duncan.

Mr. DUNCAN. I saw Larry give his one-minute yesterday about this. Certainly Congressman Mahon was very well respected. He served for many years with my father, and I knew Congressman Mahon. I think this is very proper and appropriate to do.

Ms. NORTON. I want to thank Congressman Combest for coming forward with this very appropriate recommendation.

Mr. TRAFICANT. Mrs. Johnson.

Ms. JOHNSON. I want to say as a Texan that sometimes we recognize our worth when others don't. But I am sure that the people here that have any history of being here understand the contributions of Congressman Mahon, and I certainly would urge my colleagues to support it.

Mr. TRAFICANT. I associate myself with all remarks, and we will give favorable consideration to your bill.

Mr. COMBEST. I appreciate your allowing me to make this statement.

[H.R. 2532 follows:]

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103D CONGRESS
1ST SESSION

H. R. 2532

To designate the Federal building and United States courthouse in Lubbock, Texas, as the "George H. Mahon Federal Building and United States Courthouse".

IN THE HOUSE OF REPRESENTATIVES

JUNE 28, 1993

Mr. COMBEST introduced the following bill; which was referred to the Committee on Public Works and Transportation

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A BILL

To designate the Federal building and United States courthouse in Lubbock, Texas, as the "George H. Mahon Federal Building and United States Courthouse".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DESIGNATION.

The Federal building and United States courthouse located at 1205 Texas Avenue in Lubbock, Texas, shall be known and designated as the "George H. Mahon Federal Building and United States Courthouse".

72-937 O - 93 - 3

SEC. 2. REFERENCES.

Any reference in a law, map, regulation, document, paper, or other record of the United States to the Federal building and United States courthouse referred to in section 1 shall be deemed to be a reference to the "George H. Mahon Federal Building and United States Courthouse".

Mr. TRAFICANT. We will continue with our testimony from Members.

Mrs. Johnson here from Texas has specific issues she would like to address. You may address it from here or there. We recognize you for your testimony on your two items.

TESTIMONY OF HON. EDDIE BERNICE JOHNSON, A REPRESENTATIVE IN CONGRESS FROM TEXAS

Ms. JOHNSON. Thank you very much, Mr. Chairman.

I will speak to the naming of a building for A. Maceo Smith first.

A. Maceo Smith was a black man who died in December of 1977. He had spent long years in Dallas and spent a number of those years with the Department of Housing and Urban Affairs and really gave birth to the idea of equal employment opportunity. He spent many years working to bring communities together in Dallas, contributed at every level.

He was the founder of the Dallas Negro Chamber of Commerce in the thirties. He organized an NAACP chapter there along with Thurgood Marshall. He was a personal friend and he is the godfather of Thurgood Marshall's children.

He served as national president of Alpha Phi Ep fraternity, the oldest black fraternity in this country that was founded at Cornell University. And it had such esteemed members as Thurgood Marshall, Robert Weaver, who was the first black member of a cabinet in this Nation in the Department of Housing and Urban Development.

He was one of the people to bring the suit in Texas back in 1927 so that blacks might be able to vote in the primary in Texas. And it can go on and on.

He is a man that is held in very high esteem by all citizens of Dallas because he worked untiringly to be sure that we as people could live together in harmony. He was the first person called when there was a community uprising.

I have to admit to you that he was also my mentor and was frequently called my Dallas father. He was a person that opened his home for many outstanding black Americans before they could get hotel reservations in Dallas.

He spent most of his life working to bring people together. As a matter of fact, as he died of a heart attack he was dressing to go to the campus of Bishop College to see what he could do to try to save that institution from its demise.

I ask that the Members of this committee support this bill, H.R. 2233, to name the first Federal building in the city—we have many—we are a regional city—for the first black American.

Mr. TRAFICANT. Thank you.

Ms. Norton?

Ms. NORTON. I strongly support Mrs. Johnson's suggestion and her bill and believe that it will not only recognize an important person in her community but will help educate us about who indeed is important by the important act of naming a building for him.

Mr. TRAFICANT. I, too, want to echo those comments, and we will consider that first matter very seriously.

You have a second matter.

Ms. JOHNSON. My second matter—this is probably the second time I have addressed it, and it has to do with GSA's utilization of space in a regional city in Dallas.

The current real estate market in Dallas presents unique opportunity because there are high vacancy rates in the area where many of the Federal employees are located, and they are reasonable and very, very sound buildings.

There is tremendous presence of the Federal building utilizations in the area, and I would hope that when in the next four years more than 800 square feet worth of Federal leases will expire, that they would think about utilizing some of the available spaces which probably far exceed any building that we would appropriate to be built.

But they are available, and we have had the mayor and the City Council express an interest in having some partnership with the Federal Government, since it is a Federal city, for some of the available space downtown.

Thank you.

[H.R. 2223 follows:]

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103D CONGRESS
1ST SESSION

H. R. 2223

To designate the Federal building located at 525 Griffin Street in Dallas, Texas, as the "A. Maceo Smith Federal Building".

IN THE HOUSE OF REPRESENTATIVES

MAY 20, 1993

Ms. EDDIE BERNICE JOHNSON of Texas introduced the following bill; which was referred to the Committee on Public Works and Transportation

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A BILL

To designate the Federal building located at 525 Griffin Street in Dallas, Texas, as the "A. Maceo Smith Federal Building".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DESIGNATION.

The Federal building located at 525 Griffin Street in Dallas, Texas, is designated as the "A. Maceo Smith Federal Building".

SEC. 2. LEGAL REFERENCES.

Any reference in a law, regulation, document, record, map, or other paper of the United States to the building

referred to in section 1 is deemed to be a reference to the "A. Maceo Smith Federal Building".

Mr. Hopf and Mr. McAndrew—Resumed

Mr. TRAFICANT. You are saying these buildings are available and if there were a different policy they could perhaps be purchased and owned by the government for some of this space?

Ms. JOHNSON. Yes, and we will get a lot more for the money.

Mr. TRAFICANT. We are addressing the matter of scoring that would provide GSA the opportunity to take on some of these projects in a different vein than we do now. We will consider that and look favorably upon your request.

Mr. TRAFICANT. Ms. Norton?

Ms. NORTON. No questions.

Mr. TRAFICANT. Mr. Duncan.

Mr. DUNCAN. I have no comments, Mr. Chairman. Thank you.

Mr. TRAFICANT. We will ask for your support as we move towards the legislative remedy to open up GSA so they can move into the 21st century with everybody else in the real estate business.

Mr. Hopf, thank you for tolerating such interruptions.

Ms. Norton.

Ms. NORTON. May I ask for unanimous consent to put a statement into the record?

Mr. TRAFICANT. Without objection.

[Ms. Norton's prepared statement follows:]

ELEANOR HOLMES NORTON
DISTRICT OF COLUMBIA

COMMITTEE ON
PUBLIC WORKS AND TRANSPORTATION

SUBCOMMITTEES
VICE CHAIR, PUBLIC BUILDINGS AND GROUNDS
WATER RESOURCES AND ENVIRONMENT

COMMITTEE ON
POST OFFICE AND CIVIL SERVICE

SUBCOMMITTEE
CHAIR, COMPENSATION AND EMPLOYEE BENEFITS

Congress of the United States
House of Representatives
Washington, D.C. 20515

COMMITTEE ON
THE DISTRICT OF COLUMBIA

SUBCOMMITTEES
CHAIR, JUDICIARY AND EDUCATION
FISCAL AFFAIRS AND HEALTH

JOINT COMMITTEE ON THE ORGANIZATION
OF CONGRESS

DEMOCRATIC STUDY GROUP
EXECUTIVE COMMITTEE

STATEMENT OF CONGRESSWOMAN ELEANOR HOLMES NORTON BEFORE THE SUBCOMMITTEE ON PUBLIC BUILDINGS AND GROUNDS HEARING ON THE BUY AMERICAN ACT.

July 1, 1993

I am pleased to join my colleagues this morning as we consider name bills and GSA construction feasibility studies (11(b) resolutions), and hear testimony on the role of the Buy American Act in federal procurements. I am grateful for the work and unfailing perseverance of Chairman Traficant in keeping the Congress focussed on reinforcing American jobs and American industry. The Buy American Act is therefore of particular importance to Chairman Traficant because of his determined work to protect American workers and is of considerable significance to this Subcommittee because of its application to General Services Administration (GSA) procurements.

The Buy American Act, although enacted to protect domestic labor and products, in some instances serves to disadvantage American industries in competition with foreign businesses for government supply or construction contracts. For government procurements subject to the Trade Agreement Act, an American seller must ensure that his product meets the Buy American Act's more stringent fifty percent component "rule of origin" test, while a foreign seller from a designated country is required only to show that his product, even if made of entirely foreign parts, was "substantially transformed" in that country. This competitive anomaly could not have been intended by either the Buy American Act or the Trade Agreement Act.

We cannot ignore the ways in which the rules of origin, because they are used to determine the "foreign" or "domestic" status of articles offered for procurement, interplay to competitively disadvantage American businesses in the marketplace. As the authorizing entity for all GSA real estate procurements, this Subcommittee is particularly concerned with the implementation and effect of the Buy American Act's rule of origin on competition for government construction contracts. This hearing, by helping us understand the complexity of the requirements of the Buy American Act in relation to those of other national and international trade policies, is an important first step toward putting American businesses on an equal footing with America's global trade partners. I thank Chairman Traficant for bringing this issue before our Subcommittee and welcome our witnesses here today.

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Ms. NORTON. The testimony demonstrates the importance of oversight because we have complexity that has built up over time and not been addressed. Obviously, Congress in both pieces of legislation felt it was doing the right thing and the only way to unravel such complexity is have a hearing. I would like to know whether you have any specific recommendations for how to unravel this complexity?

Mr. HOPF. I don't have any specific recommendations. There are a number of alternatives that the committee could probably take a look at and explore. The problem with this subject matter is that it is complex, as so aptly stated, and the respective interests of the people who participate in our system are dependent a lot on those complexities. So it is very difficult to figure out what actually is in our best interests.

For example, just looking at the question of whether we are trying to protect American companies as disassociated from the production of American products. For example, under Buy American you can have a company that is a U.S. national company. It is owned 100 percent by Americans. That may manufacture a product overseas, but, of course, that product would be excluded under Buy American. Is that advantageous to American industry? That is an interesting question.

Certainly one of the areas that is always worth exploring is the nature of the rule of origin tests that are associated with the Buy American Act. There is a different rule of origin test there than is applied in other acts such as the Trade Agreements Act. The rule of origin test in Buy American tends to be very complex, sometimes frustrating to the government in procuring things as well as to the contractors we deal with.

The other issue to explore is whether the question of unreasonable cost as currently implemented is the appropriate consideration of what constitutes an unreasonable cost. For example, the 6 percent differential applied to a foreign bid, is that the appropriate differential?

The final issue, and this is where it truly gets complex, is how do we balance both our interests in promoting fair trade and the advantages to domestic industry that are accomplished by that but at the same time protect our domestic economy which is served by things—arguably served by things like the Buy American Act?

I think those are all issues that are certainly worth exploring.

Ms. NORTON. I ask you about your recommendations because this looks like an issue ripe for legislation. If GSA wants to have a more practical, more efficient scheme, then either you are going to suggest what the answers are, your testimony suggests the problem, or we are going to do it.

The problem with that is we don't work directly from your experience. Then we are likely to hear next year that something was wrong with what we did. I would much prefer to see recommendations from those who have to live with this.

GSA has to live with this. GSA is on the line here. And I think that the committee needs to know from the point of view of someone who is regulated by these acts how you would undo it.

And, otherwise, I think that the committee simply has to proceed. I am just overwhelmed with how our best efforts often end

up in this kind of quagmire. That turns people off of regulation. If you do that, you get the kind of stuff we got in the S&L crisis. And finding the balance between overregulation and underregulation, between overcomplexity and simplicity that is ineffective, is very difficult for a legislative body.

So I would like to encourage GSA to move in this direction.

Finally, I would like to know how big a problem this is in your procurement.

Mr. HOPF. If I may just briefly respond to your statement. GSA certainly has no problem in sharing its experiences under Buy American with the committee and, quite frankly, from the standpoint of just buying things, I think I have already alluded to the fact that the Buy American tests are rather complex and difficult to implement.

So if you look at it from a simplification standpoint, what makes our lives easier as purchasers for the government then reduction of complexity is certainly something we are interested in.

What is much more difficult for an agency like GSA to do is to attempt to provide you the administration's perspective on what the appropriate balance may be between interests of economic protection domestically and our interest in promoting fair trade internationally. There are undoubtedly other organizations in the administration that are much better positioned to speak to that issue than GSA. That is why I hesitate.

Ms. NORTON. I want to make sure GSA is in the loop. The problem is that there are numerous agencies that are involved. I don't know if the Chairman intends to try to come forward with legislation on his own, but if this is a problem for the administration—OMB is here—then I think that the burden is on the administration as well to try to help us think through solutions to this problem.

Thank you, Mr. Chairman.

Mr. TRAFICANT. Your insight is right on target.

Mrs. Johnson, any questions?

Ms. JOHNSON. I have no questions, thank you.

Mr. TRAFICANT. One of the problems that I see here is that it makes no sense to me to consider an American-owned company overseas that hires foreign workers to get any consideration as an American firm. I believe that any firm, regardless of its ownership, that is producing a product in America should be considered an American product.

For example, would Honda of Ohio owned by the Japanese be an American product? Yes, it would. The question is, where do the components come from and are we becoming an assembler, a colony for other manufacturing entities?

Manufacturing produces wealth. Service maintains the status quo. If we are not going to, in fact, enforce this law, which I think is the problem, then what is the use of having that law?

I would like to know the number of times the Buy American Act has been waived and what was the cause for the waivers and exemptions to have triggered such action. And, number two, what is the percentage of procurement that is American as defined by current law Buy American and what is not in your procurement activities?

With that, I have some questions I would like to go forward with.

The rules of origin—there are some confusing elements here—one being that there is the Buy American Act and the Trade Agreements Act. Perhaps briefly—because I would like to move on—what is the difference, if any, of the rules of origin between those two pieces of standing legislative mandates?

Mr. HOPF. Yes, Mr. Chairman. There are two different rules of origin under the Buy American Act and the Trade Agreements Act. Those rules of origin are very important for determining the application of the acts. In the case of the Buy American, it is important for determining whether an item that is offered is a domestic end item or whether it is a foreign end item.

Under Buy American you have a two-tier test. The first test is whether the product being offered is manufactured in the United States. That is, the point of final manufacture. It has a second test that is, are the products of which the item is made, the components or the raw materials or whatever, are they substantially of domestic origin?

That has been translated into what one might call a component test. By executive order that component test comes down to a determination as to whether the cost of the domestic components that make up the final product exceed 50 percent of the cost of all the components. Briefly stated, that is what you might call the two-tier test in Buy American.

Under the Trade Agreements Act we have a different test, which focuses on the place of the final manufacture. Under the trade agreement test you determine whether a product that is being offered is a product of a designated country, a country that has signed up under one of the trade agreements or has been designated by the President.

In order to qualify an item as a designated country end product a product would have to be wholly the growth, product or manufacture of that country. Or if it is composed of other things, it would have to consist of, in whole or in part, of materials from another country that are substantially transformed into new and different articles of commerce with a name and character use different from the components of which it has been manufactured.

What is the big difference between the two? I suppose Buy American is focused not only on the place of final manufacture but it is also focused on what are the direct components that go into it. The Trade Agreements Act focuses on the final point of manufacture and the nature of the activity that occurs there—substantial transformation. It is probably a little more in depth as to what constitutes substantial transformation as Buy American alludes to in manufacture.

Mr. TRAFICANT. There is not a content differential with the Trade Agreements Act?

Mr. HOPF. No, sir, not directly.

Mr. TRAFICANT. In your experience, do certain industries prefer one rule of origin over another? Or have you recognized that as becoming a pattern? Or have there been ways of trying to circumvent the procurement aspects of buying American products, forgetting both of these laws by preferring one of those two hats that they could wear in effecting such procurement?

Mr. HOPF. Getting to the first part of the question, Mr. Chairman, I hesitate to generalize around industries.

There have certainly been expressions of problems with the current rule of origin under Buy American. They tend to—and this is certainly a generalization—come out of the high-tech industry, ADP, communications. There are a number of concerns there. First complexity. We see the complexity issue coming up all the time.

It is difficult to figure out the 50 percent component test particularly for those companies that have to do outsourcing in order to stay globally competitive, and that outsourcing tends to be a mix of foreign and domestic items. It gets into inventory problems and becomes very difficult for our contractors. Second, failure of the BAA to consider the cost of final manufacture in determining whether a product is substantially domestic.

Would you please suspend and welcome one of our great Members, Mr. Rangel from New York.

TESTIMONY OF HON. CHARLES B. RANGEL, A REPRESENTATIVE IN CONGRESS FROM NEW YORK

Mr. RANGEL. Thank you very much for your courtesy extended, Mr. Chairman. Thank you, Mr. Chairman. I will be brief, and I want to thank the entire committee for this courtesy as well as the witnesses here this morning.

I am here to request a Section 11(b) survey for a very, very important project that we have been developing over the last decade in my district. So I respectfully request that the Subcommittee on Public Buildings and Grounds request from the General Services Administration an updated Section 11(b) survey for Upper Manhattan, which would include Harlem. This would be an update on a survey already done in 1988.

I believe that the survey will show that the Trade Center is well suited for Federal use. It is likely that several agencies will find the Trade Center an excellent site for serving the populations of northern Manhattan and the Bronx. There are several agencies that will likely find the international aspect of the center useful in developing trade with the Third World.

The Harlem International Trade Center is sponsored by the State of New York and will serve as a one-stop service center to facilitate the exchange of information and promotion of trade, goods and services between the nations of Africa, Latin America and the Caribbean and the United Nations with special interest on small, women and minority enterprises.

The Trade Center will be a mixed-use facility consisting of an office tower, commercial and retail space, exhibition space for trade shows, banquet and conference facilities, a small hotel and a parking garage. It will house international tenants, State and city agencies and can accommodate related programs in Federal departments such as Commerce, State, Justice and Agriculture to make the center truly international, a one-stop place for the U.S. and the international community.

I appreciate the opportunity to work with the committee and General Services Administration in undertaking this updated survey. I believe that it is very important to the people of my community that it be undertaken.

The previous administration was aware of the fact that many departments and agencies have already requested that they be included, but we still need, before leases can be signed, this 11(b) report. We had one. We want it updated, and thank you for the courtesy.

Mr. TRAFICANT. Mr. Duncan.

Mr. DUNCAN. No questions, Mr. Chairman. I want to thank Mr. Rangel for being here.

Mr. TRAFICANT. Mrs. Johnson.

Ms. JOHNSON. Delighted to have you.

Mr. TRAFICANT. Chairman, we will seriously consider your request. We will expedite that request. We are honored to have you here, and we will stay in touch with you, and we welcome your participation in working with us on this project to see it through its fruition.

Mr. RANGEL. Thank you, Mr. Chairman.

Mr. Hopf and Mr. McAndrew—Resumed

Mr. TRAFICANT. We were in the midst of discussing some of this country of origin——

There was an incident that occurred recently in a Federal building out in Kansas City where no laws were violated but an American granite supplier several miles up the road could not effectively compete for the contract to provide granite for this Federal building because the prices of the granite from China were just too reasonable. As it turns out, the labor wages in China average 17 cents, if they weren't prison laborers who performed the work for nothing.

But here we have a classic example of what is going on where evidently there is no room for any discretion on behalf of the procurement people who end up buying granite from China, having it transported all these miles, while we have American workers that are being laid off in quarries right around the corner.

That one causes me to say beam me up on this shot.

Perhaps you could explain the trappings within our procurement dilemma which would have provided for this opportunity for China to the dismay of American workers? How is that?

Mr. HOPF. I think, from the standpoint of the procurement activity, Mr. Chairman, it simply boiled down to the fact that when we operated under executive order directions of determining what constitutes unreasonable cost for a domestic product, the applicable differentials were applied, and the conclusion was reached that, indeed, the domestic item as compared to the foreign source item was at an unreasonable cost. That is, when a differential was added onto the bid of the foreign service item that for evaluation purposes the domestic item still ended up being significantly more expensive.

In that case, from the contracting officer's perspective, it was not just a conclusion that the domestic item was an unreasonable cost. There were also some concern at the time the issue arose as to potential delays in the construction project which could have had an additional cost impact on GSA.

From that standpoint, although the types of issues that you were referring to with the labor force in China are certainly serious and meritorious issues; however, from a contracting officer's standpoint, under both the law and the executive order, there is just not a lot

that can be done with those types of issues. Frankly, even if the contracting officer were aware of those issues at the time, which undoubtedly she was not, it would have been highly questionable as to whether those factors could have brought into play at the time.

Mr. TRAFICANT. What was the cost differential? What is the percentage that you had to work with in a procurement scenario there? What was the weighted advantage that the American granite company up the road could have enjoyed over China that was not sufficient to, in fact, be competitive?

Mr. HOPF. I will try to give fairly exact figures.

The total cost of the foreign source item was $645,000. Added to that was a 6 percent differential of $38,709. Total for evaluation purposes—the total price would have been $683,000. The lowest domestic bid considered by the contractor was $730,000.

So you would have compared the 683 with the 730, and we would have concluded that, notwithstanding the application of the differential, the domestic item was still more expensive.

Mr. TRAFICANT. So about $47,000 difference. Could the Procurement Officer of GSA say, be damned with the China bid; it is $47,000 more. We are going to go with the American contract. Were you compelled by regulation or law to accept the Chinese granite? Did you have the discretion to Buy American?

Mr. HOPF. Under the circumstances of this case, it is arguable that the contracting officer might have been able to reject that. Whether that would have been subject to legal challenge is speculative.

As I said before, at the time, the contracting officer undoubtedly had no information about the labor work in China and simply looked at two factors, the unreasonable cost and as well public interest from the standpoint of the delay.

Mr. TRAFICANT. I see $683,000 that leave these shores and go to China, $683,000 removed from our economy. I see a contract that could have kept American workers working around the corner for maybe a year or longer. The difference was $50,000, $47,000. I can't for the life of me understand what our country is doing, what our government is doing.

Here is the problem I have with Buy American. Does anybody even really consider Buy American? Is it more or less a casual exercise if there is a huge discrepancy where they might consider it?

Mr. HOPF. Contracting officers do consider Buy American when Buy American is applicable to the procurement. As I said, there are many procurements in which Buy American is not applicable because of the Trade Agreements Act or Canada Free Trade the other equalization statutes.

As far as their consideration of those differentials, they are pretty much considered within the restrictive nature of what has been provided to us by the executive order and regulation of a 6 percent differential. Beyond that, quite frankly, other factors usually don't come to bear of the nature that you are talking about.

Mr. TRAFICANT. In most cases the Buy American Act could be waived as a headache, couldn't it? There are so many waivers that affect the Buy American Act without these trade agreements that—

it is so confusing that in most cases it is easier to waive the Buy American Act than apply it. Would that be a fair statement?

Mr. HOPF. I don't think I can agree with that statement, Mr. Chairman. It is not a question of contracting officers exercising a lot of discretion to waive it. What they have been told by law——

Mr. TRAFICANT. I am not talking about the discretion to waive it. I am talking about other agreements from outside that waive it. In most cases, it is waived so often it is more difficult to assess when in fact it might apply. Would that be a reasonable statement?

Mr. HOPF. I am sorry, Mr. Chairman; I misunderstood you. Yes. There are many, many cases in which Buy American is waived by virtue of those statutes.

[The following was received from Mr. Hopf:]

[PROVIDE THE FOLLOWING GSA DATA

[a. Number of procurements in which the BAA was waived in fiscal year 1992.
[b. The reasons for the waivers.
[c. The percentage of procurement that is for products of U.S. origin.]

a. In fiscal year 1992, GSA awarded approximately 574 contracts for construction or repair and alterations in excess of the small purchase limitation of $25,000. To the best of our knowledge, the Buy American Act was applied in all cases.

In fiscal year 1992, GSA awarded approximately 618 supply contracts, representing obligations of GSA funds. Of these, 197 contracts were subject to the Trade Agreements Act and, accordingly, the Buy American Act was waived. Ninety-four contracts were subject to domestic product protection statutes other than, and more stringent than, the Buy American Act.

GSA also awarded approximately 7,000 indefinite delivery contracts for direct obligation by other agencies. Virtually all of these contracts were subject to the Trade Agreements Act because the acquisitions exceeded the threshold for application of that Act.

b. When applicable, the Trade Agreements Act waives the domestic preference requirements of the BAA with respect to the products of certain designated countries.

c. In arriving at the percentage of GSA purchases that are of U.S. origin, we queried the General Services Administration Procurement Data System to determine the number of actions where the place of manufacture for supply contracts was a foreign country. This inquiry resulted in the identification of six contracts for $1,699,000. This amounts to less than one percent of the contracts (six contracts with foreign place of performance—618 total contacts for fiscal year 1992).

Mr. TRAFICANT. I think it was last year Representative Duncan, through his persistence I think, tipped off an awful lot of the Nation by looking at the matter of these great Louisville sluggers that ended up coming here from Canada.

I want to take the time, Mr. Duncan, to commend you and you on your side of the aisle for looking at this matter. It is important, as evidenced by the fact we have agreed to look into this. I don't want my questions to seem to be in the negative. We appreciate the job you have done, and we understand the legislative and procurement dilemma which Congress has placed you under. With that I would like to defer to Representative Duncan for any other questions he may have.

Mr. DUNCAN. When we looked into it we found it was $700 million in purchases and probably billions of dollars worth of purchases by the U.S. Government of these foreign made products. They listed all kinds of examples–$3 million in office furniture from Canadian firms and all sorts of other things.

You keep referring or you have referred several times to the Trade Agreements Act. It seems to me that there is sort of a conflict between the Buy American Act and the Trade Agreements Act.

Do you think that is the case? And also, if so, if that is the case, how often does this happen? What percentage of these would you estimate, rough guess, are we applying to the Trade Agreements Act rather than the Buy American Act?

Mr. HOPF. I certainly agree with you, Congressman, that there is a definite difference of perspective of Buy American and the preferences that fall under the Trade Agreements Act, and Canada free trade specifically, relating to the Canadian products.

In the one case, you are establishing a domestic preference policy. And in the case of the Trade Agreements Act and Canada–U.S. free trade, you are dis-establishing that preference; that is, you are eliminating a parochial domestic preference in favor of providing free trade between the countries. So they are coming at it from opposite perspectives.

The enactment of such statutes as the Trade Agreements Act and Canada free trade, however, clearly reflect the understanding that Buy American would not be applicable to the types of procurements to which the act would apply. So that is a going-in proposition when those statutes were enacted. In fact, Buy American would not have as extensive application as it did previously.

Mr. DUNCAN. When we looked into this we were told by the Federal Supply Service that the vast majority of these contracts were not given to the low bidder, that the procurement officers were allowed to take into consideration other considerations and that most of these things were not going to the low bidder. Do you think that is true or that is the case?

Mr. HOPF. I hesitate to jump to a general conclusion of how many are going to a low bidder and how many are not.

What the Federal Supply Service alluded to was the fact that we have different methods of buying things in the government, and, thanks to Congress, we have been given some flexibility of approaches.

In one case, we can use a procurement methodology which is strictly low bid. We look at a number and whichever is low we pick. In another procurement methodology under a negotiated procurement we may be able to look at other factors in making a selection such as the quality of the product, the past performance of contractors, et cetera. I think that is what Federal Supply Service was alluding to.

Mr. DUNCAN. Right at the time that we were looking into this last year I had a State Department employee loan me his black ballpoint pen, the push-button type that there are millions of in the Federal Government. It said made in China or it was made in some other country. Do you know if many of those pens or most of those pens are made overseas? Do you know anything about that?

Mr. HOPF. No, sir, but I would be more than happy to take a look into that specific situation and give you some information on it.

[The following was received from Mr. Hopf:]

[PROVIDE INFORMATION AS TO WHETHER GSA IS PURCHASING FOREIGN SOURCE RETRACTABLE PENS]

The General Services Administration buys millions of retractable pens annually through its Office Supplies and Paper Products Commodity Center located in New York City. Nearly all of the retractable pens are purchased from a statutorily pre-

scribed mandatory source under the Javits Wagner O'Day Act, 41 U.S.C. 48. The source is the National Industries for the Blind.

In this regard, all retractable pens purchased in fiscal year 1993 are manufactured domestically, except 182 dozen that were produced in Japan at a cost of $2,766. The pens, produced in Japan, were nonstock special purchase for various customers. These pens were for military special order requisitions that cited a special part number. Domestic sources were sought but none responded. Only responses were received from two distributors who offered the same Japanese produced pen. Consequently, the Buy American Act did not apply due to the nonavailability of domestic sources. Our current agreement with NIB for retractable pens with pocket clips is for three years and has an estimated dollar value of $19,418,072.

Mr. DUNCAN. Thank you very much.

Mr. TRAFICANT. Is Japan a designated country under the Trade Agreements Act?

Mr. HOPF. Yes, sir.

Mr. TRAFICANT. If you could write the law to clarify this mess and to streamline your activities and to make the acquisition of American products fair but not protectionist commensurate with the economic variables that exist and differential labor wages and other things, what would you do?

Mr. HOPF. What would I do to the Buy American Act?

Quite frankly, Mr. Chairman, I don't know. If there were an easy answer I suspect we wouldn't be having this hearing.

Again, all I can say is, from the standpoint of ease of procurement operations, complex tests like exist under the Buy American Act certainly make our life difficult but that is not necessarily the primary point on which public policy should be made. In this case, certainly what makes life easier for procurement people does not necessarily and should not take precedence over what is good for the country.

This is an extremely complex public policy issue, the interplay between protecting the domestic economy and our interest in promoting free trade. The question of what truly benefits domestic economy gets into some very complex considerations.

Certainly, I think that the Buy American Act rules of origin tests are things that should be periodically looked at because when the statute was originally enacted in 1933, the people putting it together with the best of intentions had no idea what the world would look like in 1993. It is a different world. We have a global economy. We have global corporations. It is just a different game today.

Mr. TRAFICANT. What would your recommendation be on the country of origin standard if you could in fact effect a change?

Mr. HOPF. I really don't have a different answer to that question from what I gave. All I can say is that from a parochial ease of operation standard the two-tiered test tends to be fairly complex. However, solving that standard in the favor of simplicity may or may not be the best thing to do——

Mr. TRAFICANT. By two-tier you mean the assembled and the content?

Mr. HOPF. Yes, sir.

Mr. TRAFICANT. You are saying it would be simpler if we take the content out and go by only the assembly?

[The following was received from Mr. Hopf:]

[WHAT ARE GSA'S RECOMMENDATIONS FOR SIMPLIFYING THE BAA RULE OF ORIGIN?]

The General Services Administration recommends that the Subcommittee review the following alternative to the current BAA test. This alternative would simplify the process for determining the rule of origin under the BAA:

Amend the BAA to use the substantial transformation rule of origin that is used in the Trade Agreements Act.

There are a number of advantages resulting from such change. First, it is simpler for both the Government and industry to apply. Second, it eliminates the gaming and irrational conclusions associated with the current test. Third, it relieves companies of potential accounting and inventory control nightmares necessary to ensure compliance with the component test, as well as any associated audit for verification purposes. Fourth, it may make it easier for domestic companies to compete with foreign firms because it offers more flexibility in outsourcing decisions. Finally, neither industry nor Government contracting officers would have to deal with different definitions under the BAA and TAA.

Mr. HOPF. That would certainly be simpler.

Mr. TRAFICANT. You would have a difficult time certifying component values.

Mr. HOPF. That is correct.

Mr. TRAFICANT. In the basic manufacturing that test is not as structured or as complicated is it?

Mr. HOPF. That is correct, sir.

Mr. TRAFICANT. Also, I am talking about this 6 percent. Do you believe the 6 percent differential applied to all markets is fair for American manufacturers? When you are looking at labor wage rates of anywhere from 10 to 50 cents to 90 cents in other economies and you have a 6 percent variation and differential of bids, isn't it a fact that perhaps that could be adjusted?

Mr. HOPF. Yes, sir, it certainly could. Over the history of the Buy American Act there have been debates as to whether that type of differential is an appropriate differential.

Mr. TRAFICANT. Would a sliding differential scale that would in effect be promulgated on differing production costs, including labor wages, be too hard to manage by procurement people?

Mr. HOPF. I am not sure I understand what you mean——

Mr. TRAFICANT. China would fit a mode where there would be a 25 percent differential. Japan would fit a mode where there would be a 6 percent differential. Would that be a big problem for you? Once you discovered the country of origin, you are not talking as much content but where the product is assembled and its shipment of origin?

Mr. HOPF. I would say the level of complexity added by that kind of application with the different countries is manageable given the current level of complexity.

Mr. TRAFICANT. But if you had the tiers and the levels of these nations with certain percentages attached to them it would be rather easy, wouldn't it, if Congress stipulated?

Mr. HOPF. If that could be done, certainly a contracting officer—as long as the country of origin is readily apparent—a contracting officer can go to the differential for the country of origin, and apply the appropriate differential.

[The following was received from Mr. Hopf:]

[PROVIDE INFORMATION REGARDING THE GOVERNMENT'S ABILITY TO SANCTION A CONTRACTOR THAT HAS FALSELY CERTIFIED THE DOMESTIC ORIGIN OF OFFERED PRODUCTS IN A PROCUREMENT COVERED BY THE BAA]

In a procurement subject to the Buy American Act (BAA), an offeror is required to certify that each offered end product is a domestic end product unless specifically identified as a foreign end product. As noted previously, foreign end products are evaluated with a price disadvantage as against domestic end products. Any resultant contract awarded to the offeror of a domestic end products contains a requirement for the delivery of domestic end products in the performance of the contract. A BAA certification that is not accurate may give rise to an action under 18 U.S.C. 1001, et seq, the False Statements Act. Subsequent demand for payment for the foreign items may be pursued under the False Claims Act, 31 U.S.C. 3729. Additionally, a contractor, failing to provide a domestic end product pursuant to the terms of the contract, may have its contract terminated for default. Finally, knowing violation of the BAA may result in a contractor's debarment from Government contracting, in accordance with Federal Acquisition Regulation Subpart 9.4 (48 CFR Subpart 9.4). The BAA specifically provides for such a sanction with respect to contracts for construction.

[PROVIDE MORE SPECIFIC INFORMATION ON THE EXAMPLE CITED AT THE HEARING OF A CASE WHERE GSA SANCTIONED A CONTRACTOR FOR MISREPRESENTING THE DOMESTIC ORIGIN OF ITS PRODUCT]

In 1988, a Federal jury sitting in the United States District Court for the District of Massachusetts found RULE INC., of Gloucester, Massachusetts, and William N. Amastos and Gray Sable, jointly liable to the United States for 302 violations of the False Claims Act. Civil penalties were imposed against the defendants in the amount of $604,000. The jury found that hacksaw blades which the defendants sold to the General Services Administration (GSA) were composed predominately of components of domestic end products. As a result of this judgment, all three defendants were also debarred by GSA. In addition, certain other firms were debarred based on their affiliation with the defendants. These included Rule Cutting Tools, Inc.; Rule International; Rule Paint and Chemical Inc., Services International Ltd.; Phillips Screw Company; and Rule Instruments Inc.

During the period of debarment, the subject parties were precluded from the award of contracts by all Executive departments and agencies unless an agency head or designee determined, in writing, that there were compelling reasons for continued business dealings between the agency and the parties debarred.

Mr. TRAFICANT. Mr. McAndrew, we realize that you were there to support the testimony of Mr. Hopf, and everything that he said is going to be attributable to you. If he lied, we are coming after you.

I will leave the record open for specifics. I want you to send me specifics on that Kansas City courthouse and the granite. I want to investigate that myself. I want to review it, and I would like to have your written recommendations if you should discover, even though it is complex, that you might have some recommendations, please have them sent to us as soon as possible here.

Mr. HOPF. I would be happy to do that.

[The information received from Mr. Hopf follows:]

[PROVIDE SPECIFIC PRICE INFORMATION ON GSA'S USE OF FOREIGN SOURCE GRANITE IN THE CONSTRUCTION OF THE KANSAS CITY, KANSAS FEDERAL OFFICE BUILDING AND COURTHOUSE]

The prime contract for the construction of the Federal Office Building and Courthouse was awarded to J. E. Dunn Construction Company (DUNN). The award price was $24,767,000. Subsequent to contract award, it was determined that certain granite for use in this construction was foreign construction material. Because of concerns as to potential project delays and resulting costs, the contracting officer reviewed the prices of the foreign material versus available domestic granite.

DUNN identified prospective subcontractors who submitted quotes. Two quotes were for domestic granite and one quote was for foreign granite.

Specifically:

Source	Price	Evaluated price
Foreign	$645,183	$683,852
Domestic	730,000	730,000
Domestic	960,032	960,032

A six percent evaluation factor was added to the price of the foreign source granite, i.e., $645,183 × .06 = $38,709. When added to the offered price of $645,143, the price for evaluation purposes was $683,852. The evaluated price was then compared with offers of domestic granite, i.e., $730,000 and $960,032. Notwithstanding the application of the BAA differential, the foreign construction material's evaluated price was over $46,000 less than the lowest domestic price. In terms of the actual cost to the Government, the offer using foreign construction material was $84,857 less than the offer using domestic construction material. Based on the applicable case law, it was determined by the contracting officer with the advice of counsel that the use of the foreign granite was not inconsistent with BAA. Information concerning this matter was previously provided to the Subcommittee in a letter dated April 29, 1993, from the Acting Commissioner, Public Buildings Service.

Mr. TRAFICANT. Thank you for your testimony and your indulgence with the Members that have come in and out of here. Thank you both for being here.

If you want to listen to the rest of our hearing we would like to welcome you to do that.

Allan Burman, Administrator, Office of Federal Procurement Policy of the Office of Management and Budget, and Mr. William Coleman, Associate Administrator for Procurement Law and Legislation, Office of Federal Procurement Policy, Office of Management and Budget, OMB.

I would ask you if you could also summarize. If you could be brief as you summarize so that we could question you.

TESTIMONY OF ALLAN V. BURMAN, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, ACCOMPANIED BY WILLIAM COLEMAN, ASSOCIATE ADMINISTRATOR FOR PROCUREMENT LAW AND LEGISLATION, OFFICE OF FEDERAL PROCUREMENT POLICY

Mr. BURMAN. Perhaps I will go on longer, Mr. Chairman.

I am making the statement, and Mr. Coleman is assisting me as Mr. McAndrew assisted Mr. Hopf.

Mr. TRAFICANT. Go ahead.

Mr. BURMAN. I am pleased to testify today. What I was going to do was talk about the background and structure of the Act, but Mr. Hopf went through that discussion before, so I will not go into that.

I do have a lengthy statement which I would like to submit for the record if I may.

Mr. TRAFICANT. Without objection, so ordered.

Mr. BURMAN. Let me talk directly to an issue that you raised with Mr. Hopf, and that is the question that I think is an important one, to address the distinction between the rules of origin in the Buy American Act and the Trade Agreements Act. We have been investigating that in a study that we conducted, looking at various ways to try to improve the operations of the Buy American Act. It was a congressionally requested study.

One of the issues that did come to light was this confusion between the two pieces of legislation and the two rules of origin. The Trade Agreements Act implements agreements to waive discrimi-

natory procurement measures for countries who have signed the Agreement on Government Procurement. And under the act the Buy American Act is waived for procurements expected to exceed $176,000 of "eligible products," these are generally other than national security items, that are produced in countries designated by the President which are primarily signatory countries other than the United States under the Trade Agreements Act.

But, unlike the Buy American Act, the Trade Agreements Act's rule of origin contains no component cost test to determine a product's domestic or foreign content. Rather, it applies a substantial transformation test. Under this approach, for a product to qualify——

Mr. TRAFICANT. Who sets that threshold? Do you know when that threshold was set?

Mr. BURMAN. I believe the threshold was set when the act was set up. It is a currency unit.

Mr. COLEMAN. It is based on an international currency unit and the U.S. Trade Representative periodically adjusts that threshold. I think this threshold was adjusted to $176,000 six or eight months ago.

Mr. TRAFICANT. The threshold was first set when?

Mr. BURMAN. When the act was passed in the late 1970s.

Mr. TRAFICANT. Go ahead.

Mr. BURMAN. Let me just talk a little bit about the substantial transformation test. Under this approach, for a product to qualify as having been produced in a designated country, it must be either manufactured in that country or, if made of materials from another country, substantially transformed into a new and different article of commerce with a different name, character or use.

For these kinds of procurements, the Federal Acquisition Regulation, which is a document that we give to the contracting officials to give them guidance on how to proceed, directs contracting officers to reject all offers of products other than either domestic end products or those products that meet the Buy American Act or designated country end products, products that were substantially transformed.

So those are the two sets of tests that are applied.

This gets a little complicated, but this is one of the reasons we are having this problem.

Let me see if I can make the distinction clear. As a result then of the two different tests, a vendor offering a product of a designated country would only be required to ensure that its product was substantially transformed in that country to qualify. If you are producing the product in an overseas country that is a signatory all you need is to demonstrate that your product has been changed while it was manufactured in that country.

On the other hand, if you are manufacturing the product in the U.S., the vendor would also have to ensure that the cost of its domestically manufactured components was more than half the costs of all of its components. Is the distinction clear?

Mr. TRAFICANT. Let me ask you this question—would this have a bearing on—under the Canadian Free Trade Agreement which would be expanded by NAFTA, that Australian beef that would be subject to strong regulation and inspection and other trade matters

coming directly into America could be completely, absolutely, divorced from some regulation if it is shipped to Canada and comes across our border from Canada?

Mr. BURMAN. Here I think we are talking about products that would be transformed into a different character or use.

Mr. TRAFICANT. I know that. I am talking about the principle. Australia used to ship to America. The meat inspectors had to certify that. There were certain legislative involvements as far as tariffs and trade activities are concerned, but once it went to Canada and Canada brings it in we don't even inspect those trucks anywhere. Won't this also be a way of manipulating the manufacturing?

Mr. BURMAN. It is a problem with the manufacturing. The same sort of a situation is what we are talking about in manufacturing. But I don't know about the circumstances with regard to subsistence items or beef. That is a different issue.

Mr. TRAFICANT. More towards manufacturing which you are concerned about. But don't some of these gray areas become such an easy way to avoid completely some of this procurement policy?

Mr. COLEMAN. Mr. Chairman, the question of whether a product is a result of substantial transformation is basically one that the Customs people decide for us. If there is a challenge, for example, that a product that has been brought in does not meet the substantial transformation test, that challenge is resolved by the customs people, not the procurement people.

If Australian beef came into Canada and was converted into hamburger I have no idea whether that would qualify or not, but the people at Customs could tell us.

Mr. TRAFICANT. With Japanese silk, even though it may have been imported from Japan, Japan is a designated country as a signatory to trade agreements. Even though the silk originated in a country that was not, that could be a possibility.

Mr. BURMAN. I think you are getting the idea.

But if we are talking about products where you had a computer where component parts came into a country that was a designated country, say those component parts came from a country that was not a signatory, as long as they were transformed into a substantially different item in the designated country, they could be sold on an unrestricted basis to the United States under the Trade Agreements Act.

If a firm is producing items in the U.S. for sale for that same government procurement for computers, if they took all of those component parts from another country, they would not meet the 50 percent componentry test that the Buy American Act applies. There you have a situation where the foreign product coming in is acceptable because of the Trade Agreements Act.

The U.S. product, because it doesn't meet the 50 percent test, is not acceptable. And that is the dilemma that I see——

Mr. TRAFICANT. American manufacturers are meeting a tougher standard, two tests. They are jumping through hoops trying to qualify on the one. And when they, in fact, do it can be waived by these signatory agreements?

Mr. BURMAN. That is a dilemma that should be resolved. The concern that—you asked what are some ways to perhaps deal with that.

One way is to say, in effect, for goods manufactured in the U.S., if they are a part of a Trade Agreements Act procurement where other designated countries can also bid because the procurement is over the threshold, that they perhaps ought to be subject to the same rule of origin test as the foreign goods are, which is this substantial transformation test.

That would be one way to eliminate this discrepancy that works to the disadvantage of the U.S. producer. The problem with that——

Mr. TRAFICANT. You would be taking the content out.

Mr. BURMAN. You are taking the content out. And the problem is one might argue then it would encourage firms to get their components offshore. That is one of the criticisms that you face.

On the other hand, if you don't do that, one of the arguments that has been raised to me by firms is that they will take assembly and manufacturing facilities and put them overseas because then they are not subject to that test. So we lose U.S. plants.

Mr. TRAFICANT. And they have, and they have been enticed by tax haven opportunities, by low wage opportunities, with little or no regulation in some of those countries, and our manufacturing exodus has been profound.

Even though our technology base has kept our manufacturing statistics looking good it is not as good as everybody would like to believe it is.

Having recognized this, what has OMB attempted to promulgate as policy in lieu of such shortcomings?

Mr. BURMAN. We had initially developed a policy document to try to do what I just suggested, to apply the substantial transformation test. After discussion with counsel in various agencies it became very apparent to us that this is a legal matter that requires legislation to make the resolution of this issue clear-cut.

If I may, there is a proposal that was included in a panel called the Section 800 Panel that looked at all the laws affecting the Defense Department. I was a member of that panel as well, and the administration is reviewing those recommendations now.

One of those recommendations does precisely what I just suggested. It recommends that the Buy American Act be amended to apply a substantial transformation test.

Mr. TRAFICANT. Without it, we would still have the Trade Agreements Act waivers. That would probably obliterate Buy American requirements anyway, won't it?

Mr. BURMAN. You would still have the Trade Agreements Act that would have as its goal open trade.

At this stage that is not an administration position because the administration is looking at this issue.

Mr. TRAFICANT. We know it may not be, but you have reviewed it, and we would like to have your counsel on that because we are looking into this matter. We are trying to confine our efforts to GSA, not to get into a referral game with the idea of killing it.

There might be a second initiative that could go on sequential referral around here, that could be offered as an amendment even to

the DOD appropriation bill. We may be able to get something done in there as a test where there is quite a bit of manufacturing that could bear upon it. We would like to have that. We appreciate your knowledge and insight and recommendations on that.

Mr. BURMAN. I thought that was the most important issue here for me to present in terms of the items that I discussed in my prepared statement, so that concludes any more formal remarks I have, Mr. Chairman.

Mr. TRAFICANT. So there is no development of legislation at this point coming from OMB as to this rule of origin problem?

Mr. BURMAN. At this point there is not, but there is formal legislation presented in the Section 800 Panel report where the language has been specifically laid out as to how to try to deal with the issue.

Mr. TRAFICANT. We would like a copy of any report you have. Even though the jurisdiction would go to trade and ways and means, we are requesting that since it has a bearing perhaps on GSA which is within our oversight area.

Mr. BURMAN. I would be pleased to provide that Mr. Chairman.

[The information received from Mr. Burman may be found beginning on Page 66.]

Mr. TRAFICANT. This 6 percent differential on the Buy American, I think you heard the testimony of GSA, and they said they would support a differential scale that would treat some countries differently because of low labor wage costs and other factors that exist. Would OMB be receptive to changes in the Buy American Act where you have 10 cents an hour labor? That the differential be changed from 6 percent to 25 percent?

Mr. BURMAN. I believe there are already legal prohibitions on acquiring goods with prison labor. There also is already in the Buy American Act some varied thresholds. There is a 6 percent basic threshold, a 12 percent threshold if small businesses are involved, and for the DOD there is a 50 percent threshold. So we already do have varied thresholds.

One of my concerns, and our responsibilities are dealing with the procurement process across the government, is that it has become so complicated, as witnessed by this issue here, that to add further complexity to the process, I think we ought to be moving in the opposite direction. I would prefer to come up with some simpler approach than to have people have to check on every country in the world that may have a different standard. I think that makes it difficult for people who have to abide by and carry out these rules.

Mr. TRAFICANT. In that regard, how much of a task would there be imposed on a procurement officer if they look at a list and say okay, where is the assembly and where is the shipment of this product coming from China? China is C. C is 25 percent. How much difficulty is that?

It would seem unfair to me—and what we don't want to do is to seem protectionist. If we put a high burden on a country like Japan, for example, even though they have a trade surplus with America, but they have labor wages that are not only consistent but at times higher than America. I think the 6 percent standard with Japan is fine.

The problem I have is having that same 6 percent standard facing up against a country like China where they can produce a product at 17 cents and manufacture as well all day and night. I don't see where you would have a big burden placed upon procurement people if there was clearly a delineated scale that was put there listing those particular countries and that list was updated every year and one of the variables was regulatory aspects in those countries and also the wage factors in those countries.

I think it is impossible to have a fair Buy American provision without some weighted advantage with this great discrepancy in labor wages.

Mr. BURMAN. You would have the complexities of trying to define per country what these differences are. There are all kinds of considerations on environmental laws and other sorts of regulation and auditing capabilities that could create additional complications in how that is established. I would be willing to look at that.

I think the Trade Representative's Office would be integral in making some decisions along those lines with regard to international trade policy.

Mr. TRAFICANT. In simple terms, what would be the best way to define an American made product?

Mr. BURMAN. I think Mr. Hopf raised a good point to talk about a strict manufacturing test perhaps with a substantial transformation if we did apply a rule of origin test as well.

Mr. TRAFICANT. Has the Office of Federal Procurement Policy evaluated the total cost alternative? I think you discussed that briefly here.

Mr. BURMAN. I did mention in the testimony that some of the high tech firms were suggesting as one alternative to not just include the cost of components but to include all of the costs of the operation so that research and development and indirect costs would also be included when you make this test.

We have looked at that. We saw problems in trying to account for these various costs for all of these categories of things and, frankly, felt that the substantial transformation proposal that I suggested to you was a better way to deal with this problem for those kinds of industries than this total cost approach.

Mr. TRAFICANT. Your testimony of current accounting practices would have to be revised so much it would be a dilemma——

Mr. BURMAN. I think it further complicates the process.

Mr. TRAFICANT. I understand that one of the major problems with the current rule of origin is the burden of paperwork, which we would like to see alleviated. How difficult is it for American firms to track the origin of each of these components?

Mr. BURMAN. One of the problems we have heard—and we had formal testimony from people from industries affected by the law—is how difficult it is to track an item when they are getting the same type of item from many different countries. Often, the items would be placed in the same bin, for example.

And being able to monitor all the items to be able to be sure that 50 percent of the components are, in fact, U.S. made causes a whole different set of accounting and logistical kinds of procedures for these firms to establish for insuring that they can comply with the law. So it is a legitimate complaint, I believe.

Mr. TRAFICANT. Mr. Burman, if we were to look at GSA and the procurement undertaking of GSA and we were to adopt a policy that would be streamlined for the GSA without affecting all these other things but considering these, do you think maybe a model could be established with GSA that could be broad enough and wide enough to serve as a trial and error type of modification for our Buy American policy? Do you think that would be a place to start?

Mr. BURMAN. I think that would be a good idea. We could certainly look at that, and I would hope we could look at doing something across the government as well.

Mr. TRAFICANT. Would OMB be willing to tackle this complex problem coming together with the oversight of this committee, public works, being that of GSA, without getting into the trade law—might be able to be specific and streamlined enough to look at these areas?

Mr. BURMAN. We would be pleased to work with the committee, Mr. Chairman.

Mr. TRAFICANT. Mr. Coleman, do you have anything you want to add before we close?

Mr. COLEMAN. No, I don't at this point. Thank you.

Mr. TRAFICANT. You are like McAndrew.

Mr. COLEMAN. We have been working this problem for quite awhile, Mr. Chairman.

Mr. TRAFICANT. We thank you for coming. We are attempting and will attempt to do something in the form of a legislative remedy, and we want OMB to be participants and hopefully supportive of it when we do bring it forward.

Thank you very much. This concludes the Subcommittee's business for the day.

[Whereupon, at 10:50 a.m., the subcommittee adjourned.]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

NOT FOR RELEASE UNTIL
DELIVERY JUNE 16, 1993

STATEMENT

OF

ALLAN V. BURMAN

ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY

BEFORE THE SUBCOMMITTEE ON PUBLIC BUILDINGS AND GROUNDS

OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 16, 1993

Mr. Chairman and Members of the Subcommittee:

I am pleased to testify before your Subcommittee regarding the Buy American Act (BAA). This morning, I would like to briefly discuss the purpose, structure, and implementation of the BAA as well as the results of a study performed by the Office of Federal Procurement Policy (OFPP) regarding the rules currently used under the BAA for determining the "foreign" or "domestic" status of items acquired by the Federal Government.

Purpose, Structure and Implementation of the BAA

The BAA was enacted in 1933 to ensure that Federal agencies give a general preference for the use of domestic materials in

Government procurement. It creates this preference by requiring that unmanufactured supplies and construction materials be mined or produced in the United States, and that manufactured supplies and construction materials be both (1) domestically manufactured and (2) composed "substantially all" from articles, materials, or supplies mined, produced, or manufactured in the United States.

With respect to manufactured items, it is important to keep in mind that the test is two-fold. Thus, an item manufactured in the United States would not be treated as domestic under the BAA if it were composed substantially all from foreign material. Likewise, an item composed substantially all from domestic material would not be considered domestic under the BAA if it were manufactured in a foreign country.

The BAA does not define what is meant by "substantially all." Its meaning was established by Executive Order 10582 issued by President Eisenhower in 1954. Executive Order 10582 states that an item shall be considered of "foreign origin" if the cost of foreign components constitutes 50 percent or more of the cost of all the components used in the item. In other words, the cost of the components manufactured in the United States must be over half the cost of all of the components.

The BAA does not bar the procurement of foreign supplies or construction material. It allows such purchases where (1)

domestic items are not commercially available in sufficient quantity and satisfactory quality, (2) the cost of a domestic item is unreasonable, (3) the items are being purchased for use outside the United States, or (4) it is inconsistent with the public interest to purchase domestic items. Foreign construction material may also be purchased if the agency head determines that use of domestic construction material is impracticable.

Executive Order 10582 sets criteria for determining whether a domestic product is reasonably priced. It directs that a differential be added to the offered price of any foreign product under evaluation. If the price of the lowest acceptable domestic offer exceeds the price (including any applicable duty) of the lowest acceptable foreign offer as adjusted by the BAA differential, the cost of the domestic product will be deemed unreasonable. Federal agencies other than the Department of Defense generally use a 6 percent differential (except where the domestic offer is from a small business concern or any labor surplus area concern in which case a 12 percent differential is applied). The Department of Defense generally uses a 50 percent differential.

In 1988, Congress made significant amendments to the BAA. These amendments prohibit Federal agencies from purchasing, for use within the United States, goods that have been mined, produced, or manufactured in signatory countries not considered

to be in good standing under the Agreement on Government Procurement (Agreement). Also prohibited are procurements from other foreign countries if their governments engage in procurements with a significant and persistent pattern or practice of discrimination against United States products or services which results in identifiable harm to United States businesses.

Although the 1988 amendments do not extend the preferential purchase requirements of the BAA to services, they bar Federal agencies from procuring the services of any contractor or subcontractor owned directly or indirectly by citizens or nationals of a foreign country that is either not in good standing under the Agreement or discriminates against United States products. Under guidance issued by OFPP, a construction contractor or subcontractor is deemed to be controlled by foreign citizens if (1) the citizens directly or indirectly control at least 50 percent of the contractor's voting stock or constitute a quorum on the contractor's board of directors, (2) the contractor's corporation is organized under the laws of a foreign country, or (3) any member or partner of a joint venture or partnership in which the contractor participates satisfies any of these criteria.

Regulatory implementation of the BAA is found in the Federal Acquisition Regulation (FAR). The FAR applies the requirements

of the BAA to "end products" in supply contracts and to "construction materials" in construction contracts. For supplies, the FAR requires offerors to certify that each end product, except those otherwise listed, is of domestic origin, and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States. For construction, the FAR requires that prime contracts contain a clause stating that only domestic construction material will be used by the contractor, subcontractors, material men, and suppliers in performance of the contract, except for foreign construction materials (if any) listed in the contract.

Alternatives to the BAA's Rule of Origin

In 1988, Congress directed OFPP to conduct an assessment of the rules currently used under the BAA for determining whether an item is of foreign or domestic origin. This assessment was to include, among other things, the identification and evaluation of reasonable alternatives to the BAA's rule of origin. Four major alternatives were identified and evaluated in the study.

The first alternative, a "total cost" approach, would have amended the 50 percent component cost rule of the BAA to permit a product to qualify as domestic only if all of the domestic costs -- including the cost expended for research, development, and manufacturing, as well as the indirect costs of bringing a product to market -- exceeded 50 percent of the total costs of

the item. Under the present rule, only the direct costs of the components are considered. Proponents of the total cost method argued that it would create an incentive for many firms to conduct more of their research, development and manufacturing activities within the United States and that such costs could be readily audited. However, several disadvantages were identified, including increased costs from additional accounting requirements, an increase in the number and complexity of Government audits to verify "total cost" certifications, and potential problems in determining the allocation of indirect costs to a particular product.

The second alternative, an "aggregation" approach, would have permitted certification of individual units on the basis of the domestic content of a production lot. This would avoid the difficulty of having to track the origin of each component to each end item in order to certify its domestic content as the FAR requires.

The third alternative would have revised the BAA rule with a "control of the enterprise" concept that would grant preferential treatment to products according to the home country of the entity controlling the enterprise and the location of the manufacturing facility producing the products. Under this approach, products manufactured in the United States by United States firms controlled by United States citizens would receive preferential

treatment over either products manufactured in the United States by foreign controlled firms or products produced in foreign countries by firms controlled by United States citizens. The disadvantages identified with this approach were that its adoption: (i) would result in an added administrative burden to collect and verify the data necessary to identify the status of specific firms offering goods and services to the Government, (ii) could generate time consuming and costly protests over who controls an enterprise, and (iii) would create barriers to open international procurement opportunities that international agreements have sought to eliminate.

The fourth alternative, a "subcomponents and materials" alternative, would have required that the BAA component test be revised to require certification of compliance with the BAA at each level in the build-up of an article being offered to the Government. The disadvantage identified for this alternative was that it was seen as imposing a substantial increase in the administrative burdens placed on all suppliers and subcontractors down to the lowest identifiable tier.

In summary, each alternative had its advocates. However, no single alternative was considered sufficiently advantageous to replace the current BAA test.

Effect of the BAA's Rule of Origin on the International Competitiveness of United States Products

As part of its assessment, the OFPP study also examined what, if any, effect the BAA's rule of origin has on the international competitiveness of United States products. The focus of this part of the study was on procurements subject to the Trade Agreements Act (TAA). The TAA implements agreements made by the President in the General Agreement on Trade & Tariffs and the Agreement on Government Procurement to waive discriminatory procurement measures for signatory countries. Under the TAA, the BAA is waived for (i) procurements expected to exceed $176,000 (ii) of "eligible products" (generally products other than for weapons and other items indispensable for national security or national defense) (iii) produced in countries designated by the President (primarily signatory countries other than the United States). The TAA also prohibits agencies from purchasing products from nondesignated countries.

For a product to qualify as having been produced in a designated country, it must be either (1) wholly produced or manufactured in that country or (2) in the case of a product consisting in whole or in part of materials from another country, substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. Unlike the BAA, the TAA's rule of origin contains no component cost test.

For procurements subject to the TAA, the FAR directs contracting officers to reject all offers of products other than domestic end products (i.e., products meeting the BAA's two-pronged test) or designated country end products (i.e., products substantially transformed in a designated country). Accordingly, if a vendor wished to offer a product from a designated country, it would only be required to ensure that such product was substantially transformed in that country for its product to be considered. However, if the same vendor wished to offer a product that was manufactured in the United States, it would also have to ensure that the cost of its domestically manufactured components is more than half the cost of all of its components, since the United States is not a designated country. In other words, a product composed of entirely foreign components -- with no United States content whatsoever -- could be offered on an unrestricted basis to the United States Government under procurements subject to the TAA if it were substantially transformed in a designated country, but that same product would be excluded from consideration if it were substantially transformed in the United States.

The study thus found that United States products are being placed at a disadvantage in procurements subject to the TAA when competing with foreign products produced in designated countries. It is believed that this inequity was not anticipated when the two statutes were enacted. The intent of the BAA is to give

preference to domestic end products. With regard to the TAA, there is no indication that Congress intended to discriminate against products manufactured in the United States.

The study proposed a regulatory change that would allow contracting officers to accept products in procurements subject to the TAA that are either (i) wholly produced or manufactured or (ii) substantially transformed in the United States without regard to the origins of the content. The study concluded that legislative action could provide a more permanent solution to the discriminatory burden being placed on domestically manufactured products in United States Government procurements that are subject to both the BAA and TAA.

Subsequent Assessment

Since the issuance of the OFPP study, the "Section 800 Panel" (so named after Section 800 of FY 1991 Defense Authorization Act) has also reviewed the provisions of the BAA. It too concluded that products manufactured in the United States are being placed at a competitive disadvantage to certain foreign source products. To remedy this inequity, the 800 Panel recommended that the BAA's rule of origin be amended to require only that products be either manufactured or substantially transformed in the United States. It suggested eliminating the 50 percent component cost requirement.

Conclusion

As the OFPP study reveals, there are many issues associated with the BAA's rule of origin which must be considered in evaluating whether the process is operating effectively. The Administration is carefully reviewing the 800 Panel's assessment and recommendation. We are examining whether use of one rule of origin can alleviate the problems created by having to apply two rules to certain procurements. I commend you for taking the time to make your own evaluation and would welcome any suggestions offered by you and your staff for helping to improve this process.

This completes my statement, Mr. Chairman. I will be glad to answer any questions you or the Members of the Subcommittee may have.

Chapter 7
Defense Trade and Cooperation

STREAMLINING DEFENSE ACQUISITION LAWS

Report
of the
Acquisition Law Advisory Panel

to the
United States Congress

January
1993

7.1. Purchases of Foreign Goods by the Department of Defense

7.1.0. Introduction

Historically, the United States has given a preference to U.S. goods and services.[1] For many years, the statutory source of this preference has been the Buy American Act.[2] As implemented by Executive Orders[3] and the DOD balance of payments policy,[4] foreign source goods are excluded unless the price of equivalent U.S. goods exceeds the foreign price by 50% or more.[5] Today, however, the Buy American Act is frequently less relevant to defense acquisition because of:

- the proliferation of special purpose legislation applicable only to DOD which further restricts the acquisition of foreign source items for specific classes of products (*e.g.*, busses, hand measuring tools);[6]
- memoranda of understanding and related international agreements between DOD and various nations which modify or eliminate Buy American restrictions;[7]
- the Trade Agreements Act of 1979,[8] and the Caribbean Basin Economic Recovery Act;[9] and
- implementation of other policies intended to protect the defense technology, industrial, and mobilization base.[10]

In addition, the application of the Buy American Act to specific goods and classes of goods can be arbitrary, unfathomable, and inconsistent with the purposes for which the Buy American Act was enacted.[11] Moreover, the rule-of-origin definition of a U.S. source product in

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[1]Buy American restrictions have been traced back to 1844. *See* Gantt & Speck, Domestic v. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order, 7 J. Pub. Law 378, 379 (1958)

[2]41 U.S.C. §§ 10a-10d.

[3]Current practice under the Buy American Act stems from the issuance of Exec. Order No. 10582 on December 17, 1957. That Executive Order has since been amended by Exec. Order Nos. 11051 (1962), 12148 (1979), and 12608 (1987).

[4]*See generally* DFARS subpart 25.3.

[5] FAR 25.105 and DFARS 225.105(1).

[6]*E.g.*, 10 U.S.C. § 2507.

[7]*See generally* DFARS subpart 25.8. Countries with treaties or MOU's (21) include Belgium, Canada, Denmark, Egypt, Federal Republic of Germany, France, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Turkey, and the United Kingdom. In addition, Australia, Sweden, and Switzerland enjoy special exemption from the Buy American Act and the balance of payments program. DFARS 225.872-1; and DOD Volume, Reciprocal Procurement Agreements, OUSDA/DDP-1992.

[8]19 U.S.C. §§ 2501 *et seq.*

[9]19 U.S.C. §§ 2701 *et seq.*

[10] DFARS subparts 208.72 and 225.71.

[11]*See generally* 2 Nash & Cibinic Report, No. 7, ¶ 39 (July 1988), commenting on *Orlite Engineering Co.*, B-229615, 88-1 CPD ¶ 300.

the Buy American Act (as implemented by Executive Order) is different from the definition in the Trade Agreements Act.[12]

7.1.0.1. Product Preferences and Domestic Source Restrictions

Today, there is no coherent and consistent statutory approach to product preferences and source restrictions on defense acquisition. Chapter 148 of Title 10 currently contains some statutory guidance.[13] However, review of the DFARS Part 225 shows that a contracting officer, to determine applicable source restrictions, must look to at least the following disparate sources of law:

- Chapter 148, Title 10;
- The Trade Agreements Act, Title 19;
- The Buy American Act, Title 41;
- Military assistance and foreign military sales, Title 22;
- Various annual authorization and appropriations acts;
- International treaties; and
- Memoranda of understanding and related international agreements.

In addition, Congress has frequently added, but rarely subtracted, restrictions through the authorization and appropriation process, often with exceptions and conditions that are product unique and totally uncoordinated with similar exceptions in other statutes. As a result, a contracting officer must know not only the restrictions applicable to products like the product to be acquired, but must also determine whether a restriction is applicable to the specific appropriation to be used to fund the specific acquisition.

The Panel recommends that source restrictions applicable to DOD acquisition be restated in a comprehensive way. As the Secretary of Defense has found, the language of current source restrictions[14]

> . . . is often confusing, causing administrative problems and difficulties in implementation. The wording of the restrictions does not follow a common format and rarely defines the product or industry precisely. Each restriction has distinct requirements,

[12]Under the Buy American Act and Exec. Order No. 10582, an article is considered a foreign end product if it is not produced in the United States, or if it is produced in the United States and 50 percent or more of the cost of its components originate from foreign sources. The Trade Agreements Act uses a "substantial transformation" method to determine country of origin. Under this approach, articles are considered the product of a particular country regardless of the cost of foreign components so long as those components are substantially transformed within that country into a new and different article of commerce with a name, character, or use distinct from that article form which it was transformed. *See generally* Office of Federal Procurement Policy, Report to Congress: Buy American Act—A Study of Alternatives to the Rule of Origin (December 1990).

[13]Chapter 148 was substantially modified by the Defense Authorization Act of 1993; with those sections concerning international agreements, offsets, and source restrictions were renumbered as §§ 2531-2534.

[14]Secretary of Defense, A Report to the United States Congress On The Impact of Buy American Restrictions Affecting Defense Procurement, Department of Defense (July 1989), at pg. 6.

> exemptions, and waiver provisions and can be amended, extended, or terminated from year to year. . . . Many restrictions are rigid, being strong prohibitions against procuring from any foreign sources, with only limited exemptions or waiver provisions. In some cases, . . . restrictions are not waived for North Atlantic Treaty Organization (NATO) and other qualifying countries.

In addition, to the extent that the provisions permit waivers and exemptions, there is great disparity in the circumstances and procedures permitting waivers of a statutory prohibition on foreign sources.[15] Finally and most importantly, the Secretary has found that current restrictions do little to further the U.S. industrial base, but do much harm in delaying procurement actions, precluding DOD access to important new technologies, and generally raising the price DOD must pay for the goods and services it buys.[16]

The Panel further recommends that the restatement apply specifically to DOD and be placed in a new subchapter, itself part of a new, more general chapter in Title 10 on Defense Trade and Cooperation. A restatement applicable only to DOD is justified because the considerations applicable to source restrictions for defense products and services are unique from those applicable to most (perhaps all) civilian agencies.

7.1.0.2. Restrictions on Foreign Contracting, Ownership, Control, and Influence

The restrictions on foreign contracting, ownership, control, and influence are multidimensional. For example, in 10 U.S.C. § 2327, DOD may not contract with foreign entities owned or controlled by a foreign Government which supports international terrorism.[17] The restriction is implemented by FAR[18] and DFARS[19] regulations.

Section 5021 of the Omnibus Trade and Competitiveness Act of 1988 (as enacted, 50 U.S.C. App. 2170 (Exon-Florio Amendment)) entitles the President, in the interests of national security, to block or restructure a proposed merger, acquisition, or takeover of a U.S. company by a foreign entity.[20] The statute is premised on a procedure of voluntary notification in mergers, acquisitions, or takeovers involving prospective foreign ownership. Following passage of Exon-Florio, there have been several studies conducted by the General Accounting Office (GAO)

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[15] *Id.*

[16] *Id.*, at pg. 7.

[17] For ownership or control of contractors or subcontractors by citizens or national of foreign countries with respect to construction services, *see* 10 U.S.C. § 10b-1.

[18] FAR Parts 209, 225, and 252.

[19] DFARS 209.104-1(g) and 225.000-71.

[20] *See* 31 C.F.R. Part 800; The Presidential review process entails: (1) the conduct of a confidential investigation by the Committee on Foreign Investment in the United States (CFIUS) [established by Exec. Order No. 11858]; (2) appropriate action by the President "to suspend or prohibit any acquisition, merger, or takeover;" (3) supported by findings based on "credible evidence" that "the foreign interest exercising control might take action that threatens to impair the national security" and that no other provision of law can adequately address the situation; and (4) after considering various enumerated factors relating to domestic industrial production.

concerning Federal data collection on foreign investment in the U.S.,[21] and the extent of foreign participation in the Strategic Defense Initiative Program.[22]

Testimony in 1990 concerning the implementation of Exon-Florio, however, revealed [23]

> . . . At the present time, notifications are coming in to CFIUS at the rate of 350 a year. Some 350 filings annually would represent, we estimate, around 50 percent of annual acquisitions valued at more than $1 million. This is a fairly large proportion, though perhaps not inappropriately so in view of the interplay and dynamics of technology, the economy and defense.
>
> To date, CFIUS has gone to the investigation stage seven times. In two of those cases, notification was withdrawn with CFIUS permission and one investigation is in progress. Four cases have reached the President's desk for decision. In only one of those cases has the President exercised his statutory authority to prohibit a foreign acquisition . . . .[24]

Related GAO testimony at the time, from the defense industrial security perspective,[25] highlighted procedural weaknesses in the practice of granting Special Security Agreements (SSAs).[26] These agreements were initiated in 1984 to permit U.S. firms that are foreign owned, controlled, or influenced (FOCI) to continue to work on classified defense contracts.[27] Under DOD policy, SSAs are limited to contracts whose classification level does not exceed the Secret level, provided the FOCI emanates from a country with which the U.S. has a bilateral industrial security arrangement.

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[21]General Accounting Office, Foreign Investment, Federal Data Collection on Foreign Investment in the United States, GAO/NSIAD-90-25BR, October 1989.

[22]General Accounting Office, Strategic Defense Initiative Program, Extent of Foreign Participation, GAO/NSIAD 90-2, February 1990.

[23]Testimony of the Honorable Charles H. Dallara, Assistant Secretary of the Treasury for International Affairs, before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the Committee on Energy and Commerce, U.S. Senate, March 13, 1990.

[24]Divestment order of the China National Aero-Technology Import and Export Company's (CATIC) acquisition of MAMCO Manufacturing, Inc. (MAMCO), a U.S. company - February 1990.

[25]*See* Exec. Order No. 10865, 32 C.F.R. Part 155, and DOD Directive 5200.2-R.

[26]Statement for the Record, National Security and International Affairs Division, GAO, for the Committee on the Armed Services, House of Representatives, March 21, 1990. The procedural weaknesses noted included: (1) interim security arrangements prior to a formal SSA were deficient in that new contracts were awarded during the period and the period itself was extending up to a year or more; (2) incomplete or inadequate supporting justifications, pursuant to the Services implementing regulations, citing need for a product or service that is mission-critical, cannot be obtained in sufficient quantity from U.S.-owned sources, and involved a unique product or technology; (3) inadequate determinations that the risks of FOCI can be negated or reduced to an acceptable level; and (4) that DOD policies requiring outside directors of the FOCI firm to be DOD watchdogs were inadequately documented in practice.

[27]*Id.*, at pg. 1, it was noted that "In practice, under an SSA, the foreign firm is permitted to retain a minority position on the U.S. firm's board of directors."

Most recently, however, a major CFIUS investigation resulted in the withdrawal of a proposed sale of a U.S. firm to a foreign Government-owned firm. The proposed sale of the missiles division of the LTV Aerospace and Defense Company to the Thomson-CSF firm, which is 58% owned by the French Government, would have involved access to highly classified or "proscribed information."[28] The specter of a potentially blocked sale raised much international concern that was assuaged only by the voluntary withdrawal by Thomson-CSF from the proposed purchase.

Based on the LTV-Thomson scenario, and on the studies and testimony discussed above, the Defense Authorization Act of 1993 enacted new provisions to address this type of foreign investment.[29] Two of the provisions focus on entities controlled by foreign Governments and specifically prohibit: (1) the purchase, by an entity controlled by a foreign Government, of certain U.S. defense contractors that perform DOD or Department of Energy (DOE) national security contracts requiring access to proscribed information; and (2) the award of certain DOD/DOE national security contracts to an entity controlled by a foreign Government. The third provision directs DOD/DOE to develop a database helpful to CFIUS under section 721 of the Defense Production Act.

In comments to the Panel, the Navy expressed support for the new provisions because they strengthened the overall Exon-Florio regime and will provide CFIUS a more structured framework. The remaining deficiency in the process was cited as:

> . . . the definition of a "control" transaction in Exon-Florio remains flawed (from a DOD perspective) since it permits far too many [true corporate] "control" transactions to proceed forward without scrutiny.[30]

While taking no position on the matter, the Panel hopes that further study will be done by others more experienced in matters concerning foreign contracting, ownership, control, and influence to develop a comprehensive regime that ensures coordination of policy on foreign control over U.S. defense contractors with defense trade and cooperation, since the multinational buying and selling of key defense industries can trump the best laid plans to create a reciprocal defense trading regime.

7.1.0.3. Overview of Subchapter Recommendations

The remainder of this subchapter (Chapter 7.1.1. and following) discuss each codified section of law which relates to domestic source restrictions applicable to DOD procurement contracts, and gives the Panel's recommendations on both amendment and recodification. A draft

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[28]Characterized by the DOD Acting General Counsel in Congressional testimony as "sensitive enough to generally prohibit foreign nationals and representatives of the foreign interest from having access to it". *See* S. Rep. No. 3114 at pg 234.

[29]Pub. L. No. 102-484, §§ 835-8, 106 Stat. 2442.

[30]Memorandum from Mark E. Rosen, CDR, JAGC, Office of the Navy Judge Advocate General, International Law Division, to Donald Freedman, Executive Secretary, Acquisition Law Panel, dated 11 October 1992.

of the proposed subchapter on domestic source restrictions within the proposed Chapter on Defense Trade and Cooperation -- which sets out the law as amended and recodified -- can be found in subchapter 7.4. below. In addition, a discussion of product restrictions prevalent in defense appropriation and authorization acts over the past decade can be found in Appendix C of this Report. To the extent that such provisions have been codified, they are discussed below; the Panel has recommended that none of these provisions be retained except to the extent they have been codified. This section of the Report concludes with a section-by-section discussion of the proposed new subchapter, which highlights the source of each proposed section and summarizes amendments that have been made to existing laws.

7.1.0.4. Section-by-Section Discussion

Section 2x10. Definitions

This section prescribes a uniform set of definitions for use in describing source restrictions. The definitions in this section are taken from 10 U.S.C. § 2506 and 41 U.S.C. § 10c, with modifications. The most important modification is the definition of "American Goods." In the proposed subchapter, "American goods" are defined as:

- an end product that is wholly mined, produced, or manufactured in the United States; or

- an end product that is manufactured in the United States which includes components mined, produced, or manufactured outside the United States if such end product is substantially transformed within the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

This definition is taken from the Buy American Act, but has been modified to introduce the concept of substantial transformation, which is the test for country of origin found in the Trade Agreements Act.[31]

The Panel believes that the substantial transformation test is a more rational test to apply than the components test used under the Buy American Act -- at the very least, substantial transformation is capable of being verified without audit -- and for that reason alone, will streamline and unify the acquisition considerations applicable to foreign source products. Given the substantial "gaming" that is permitted by the current components test[32] and the extensive

[31]19 U.S.C. § 2518(b): "Rule of Origin.—An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed."

[32]Under the Buy American Act and implementing Executive Orders, an end item is domestic if it meets the following three tests: (1) the process of manufacturing the end product must occur in the United States; (2) over 50% of the cost of components must be incurred for components manufactured in the United States; and (3) to constitute a domestic component, the process of manufacturing of the component must occur in the United States

DOD exemptions to the Buy American Act,[33] there is no reason to believe that abandonment of the components test will lower the average United States labor content of articles purchased by DOD. In addition, the substantial transformation test can probably be met by U.S. source commercial items (as defined in proposed 10 U.S.C. § 2302) whereas the component test has required significant changes in manufacturing or subcontracting methods, and thereby creates a potential barrier to civil-military integration.

A second important definition is that of "covered contract." The subchapter defines this term as:

> a contract for property, other than real property and commercial items and components as defined in 10 U.S.C. §§ 2302(5) and 2xx2, the total value of which exceeds the simplified acquisition threshold set out at 10 U.S.C. § 2302(4).[34]

In recommending a separate statute on commercial items, the Panel considered the effect of the integration of commercial items with defense trade and cooperation. The recommendation of the Panel was to subject the defense acquisition of commercial items to defense trade provisions, for to do otherwise would defeat the exercise of balancing defense trade and cooperation with the need to preserve a national defense technology and industrial base. Similarly, the treatment afforded the acquisition of commercial items in the recommended separate statute is cross-referenced in this Chapter. The function of this definition is intended to exempt simplified acquisition, commercial items, and commercial components from domestic product preferences and source restrictions.

Section 2x11. Policy on Purchases of Foreign Goods

This section is taken from 10 U.S.C. § 2506, which states the factors to be considered in determining whether to purchase foreign source items. The current provisions of section 2506 are incomplete because national security, technology, industrial, and mobilization base considerations are left out. In addition, section 2506 fails to account for treaties and other international agreements. Paragraphs (a)(7), (a)(8), and (a)(9) have been added by the Panel to address these omissions. Comment from the Section of Public Contract Law of the American Bar Association indicated that:

> The Section supports the Panel's proposed language in sections , , 2x11 and 2x12 of the draft text. We encourage the elimination of

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but the component's components can come from anywhere. Thus, if 95% of the labor in components is United States labor, but the item is assembled in Mexico, the item does not qualify as a domestic end item under the Act. On the other hand, if the end item is manufactured in the United States from components assembled in the United States from 100% foreign sub-components, then the item qualifies as domestic. As these examples show, the amount of United States labor in a conforming end item may actually be less than in some non conforming end items. *See generally* 2 Nash & Cibinic Report, note 11, *supra*.

[33]Note 14, *supra*.

[34]The reference is to 10 U.S.C. § 2302, as modified by the Panel, and to new section 2xx2. *See* Chapters 1, 4, and 8 of this Report.

> unnecessary buy-national requirements provided that the Secretary of Defense retains the authority to limit procurement of specific goods or services to domestic sources if he determines it would be in the national interest to do so.[35]

After considering the Buy American Act, domestic source restrictions, and product preferences, the Panel recognized the need for coordination with the defense technology and industrial base in its recommended paragraph (a)(7). The Panel also notes that the present day reality of a defense technology and industrial base involves a North American defense industrial base. As stated in the Defense Authorization Act of 1993, the national defense technology and industrial base is now defined as encompassing the United States and Canada.[36] For too long, DOD has wrestled with establishing a policy on the purchase of Canadian products as foreign goods, while concurrently seeking to preserve and enhance the North American defense industrial base. Hopefully, the proposed language will assist in rationalizing the policy toward Canadian goods.

Equally important in the international acquisition policy arena is the recommended addition of paragraph (a)(8). This paragraph requires DOD to coordinate, not only with obligations contained in international treaties and agreements, but also with the acquisition activities of our major allies, and reinforces the efforts currently underway to make international defense trade more visible, transparent, and reciprocal.[37] The Panel believes that linking the two policies in (a)(7) and (a)(8) within section 2x11 will enable DOD to jointly address the inter-relationship between defense trade and the national defense technology and industrial base as an international defense acquisition issue.

The addition of paragraph (a)(9) requires the Secretary of Defense to address national security concerns in purchasing foreign goods. With the addition of this subparagraph, the Panel recommends repeal of 10 U.S.C. § 2327 as duplicative and unnecessarily restrictive in focusing only on considerations of ownership by countries supporting terrorist activities.[38] Again, broad new provisions enacted by the Defense Authorization Act of 1993 mandate a national security reporting threshold of $500,000 in the award of defense contracts to foreign owned and controlled companies, as well as prohibitions on the purchase of certain U.S. defense contractors by, or the award of national security contracts to, entities controlled by a foreign Government.[39] Section (a)(9) is intended to provide DOD with the broad authority to protect national security through source restrictions including those based on foreign control of U.S. sources (as well as purchases from foreign sources).

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[35]Letter from Karen Hastie Williams, Chair-Elect, on behalf of the ABA Section of Public Contract Law, to William E. Mounts, Defense Systems Management College, dated November 12, 1992.
[36]Pub. L. No. 102-484, § 4203(a), 106 Stat. 2442.
[37]*See* the discussion at section 7.2.0.1., *NATO Code of Conduct in Defense Trade*.
[38]*See also* note 30, *supra*.
[39]Pub. L. No. 102-484, §§ 835-8, 106 Stat. 2442.

The amended section also contains a new subsection (b) which replaces the existing reference to the Buy American Act with a reference to the new subchapter. The amended definition in subsection (c) is recommended for consolidation in new section 2x10, *Definitions*.

Section 2x12. Items Restricted to American Sources

The Buy American Act has not been an impenetrable barrier to the acquisition of foreign source items since the Eisenhower Administration. There are, however, numerous absolute or nearly absolute prohibitions on the purchase of specific items from foreign sources. Some, but by no means all, of the absolute prohibitions are found in the current version of 10 U.S.C. § 2507. However, the important authority of the Secretary of Defense to restrict purchases to domestic sources to protect the defense technology and industrial base and further national security is nowhere expressly stated in the United States Code, but is found only by inference from exceptions to other than competitive procedures found in 10 U.S.C. §§ 2304(c)(3), (4), and (6).

The Panel recommends that the authority of the Secretary to restrict procurements to domestic sources be expressly granted by statute, and language enacting that regulation is found in subsection 2x12(a). In addition, the prohibition on the purchase of goods from countries that are in violation of the Agreement on Government Procurement, or which otherwise discriminate against U.S. products, currently found in 41 U.S.C. § 10b-1, is incorporated into subsection 2x12(b) with two exceptions: (1) commercial items and components are permitted to be acquired from any source; and (2) the restrictions in section 10b-1 are not applicable to contracts made under simplified acquisition procedures.[40] The Panel believes that these exceptions facilitate the acquisition of commercial products and ancillary commercial services while removing regulatory hurdles from -- and hence reduce the cost of -- the award of smaller contracts. The commercial item exception can be redressed in the overall GATT trade dispute settlement regime in any case; and as for the exception for simplified acquisition procedures, the Panel recommended $100,000 threshold is still below the present GATT threshold of general applicability.

Finally, other than the recommended deletion of the expired restriction on carbonyl iron powders found in subsection (f), provisions for absolute restrictions currently found in 10 U.S.C. § 2507 were retained as subsections in section 2x12. In section 2x12, the existing statutory restriction on the transfer of large-caliber cannon technology presently found in 10 U.S.C. § 4542 and the restriction on construction or repair of vessels in foreign shipyards contained in 10 U.S.C. § 7309 were consolidated with the current statutory restrictions of 10 U.S.C. § 2507(a) through (e). The Panel recommended that the many other restrictions contained in annual authorization and appropriation acts, be repealed. As succinctly stated in the 1989 Secretary of Defense Report to Congress on the impact of domestic source restrictions:

> . . . there are currently underway or in development many programs initiated by the Congress, DOD, the Services, other executive branch agencies, and U.S. industry to bolster the competitiveness of the U.S. industrial base. Now is the time to integrate and rationalize such initiatives into an overall strategy, rather than

[40] *See* discussion at Chapters 4 and 8.

> proliferate new initiatives and continue old ones that have outlived their usefulness or proven counterproductive.
>
> For all of these reasons, we therefore recommend a careful phasing out of most ad hoc buy American restrictions that have been enacted in annual DOD appropriations and authorization acts.[41]

Subsection 2x12(h) contains the Stratton Amendment, found in 10 U.S.C. § 4542, which prohibits the transfer of technical data packages for large-caliber cannon to foreign countries. As there are exceptions to the transfer prohibition, where coproduction or cooperative project agreements are in place, comment from the U.S. Army indicated that the provision was recommended for retention.[42] Other than amending the provision to be consistent with section 2x31 on cooperative project agreements, the provision was retained and consolidated in this section. Subsection 2x12(i) retains and consolidates the present restriction on the construction or repair of vessels in foreign shipyards contained in 10 U.S.C. § 7309.

Other than these two restrictions and those found in 10 U.S.C. § 2507, the Panel recommends that reliance for establishing domestic source restrictions and product preferences to protect the national defense technology and industrial base should reside, instead, within the primary authority of the Secretary of Defense.

Section 2x13. Application of the Trade Agreements Act of 1979

Subsection (a) of this section clarifies the relationship of the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501 *et seq.*, to both the absolute restrictions stated in section 2x12, and to the Buy American Act, as that Act is restated for purposes of Title 10 in section 2x14.

Subsection (b) resolves a problem with spare parts acquisition under current law. The Trade Agreements Act permits the purchase of manufactured goods from designated countries which are made from components which may be foreign both to the country of origin and the United States. For example, a Japanese company may build a computer printer in Japan using components from Taiwan. Under the Act, the Japanese printer can be purchased as though it were a domestic item. However, spare parts for the printer, when bought separately from Taiwan, do not qualify for exemption from the Trade Agreements Act and may not qualify for regulatory exemption from the Buy American Act. The Council of Defense and Space Industry Associations commented on this problem as follows:

> To impose "Buy American" requirements on the acquisition of spare parts when the original system was exempted from such requirements (whatever the reason) makes no economic sense and subjects the supplier to senseless hardship. Although DFARS

[41] Note 14, *supra*.

[42] Memorandum from Larry D. Anderson, LTC, JAGC, Legal Officer, U.S. Army Materiel Command, to William E. Mounts, DSMC CM-AL, dated 21 September 1992.

> 225.102(b)(iii)(B) contains a spare parts exception to "Buy American [Act]" for DOD procurements, the exception should be included in the statute in order to extend it to all federal procurements and to preserve this exception from regulatory changes. Also, to further Congress' current initiatives to remove barriers to the integration of the commercial and defense industrial bases, the exception should cover spare parts for commercial items.[43]

The Panel notes that there is currently no statutory or regulatory coverage exempting spare parts purchases from the Trade Agreements Act, although there must be such coverage if DOD's needs for spare and replacement parts are to be met. Given the proposed amendment of the Buy American Act to incorporate a substantial transformation test, the Panel believes there is no further need to treat spare parts for commercial items as a separate class, since spares for such items can be purchased under the spare parts exemptions provided by the Panel in sections 2x13 and 2x14.

Section 2x14. Preference for American Goods

This section implements the Buy American Act within Title 10. Since the term "American good" is defined in section 2x10, the language of 41 U.S.C. §§ 10a and 10b can be greatly simplified. Paragraphs 2x14(a)(1) and (a)(2) implement current exemptions from the provisions of the Buy American Act. The exemption set out in paragraph 2x14(a)(3) is a spare and replacement parts exemption similar to that found in subsection 2x13(b).

The proposed section also repeals the debarment provisions found in 41 U.S.C. § 10b(b) which provides for blacklisting Government contractors violating Buy American restrictions. These provisions, while seemingly absolute, have been interpreted to apply only where there is a knowing and willful violation of the Buy American Act.[44] Since regulatory suspension and debarment procedures are also triggered by a knowing and willful breach of contract, or a false representation,[45] there is no need to retain a stand-alone, statutory procedure.

Section 2x15. Determination of Unreasonable Cost

This section implements in statute the "unreasonable cost" concepts currently found in Executive Orders implementing the Buy American Act and in the FAR. The Panel has created a section setting forth these standards so that, for any future statutory source restrictions, this section can be used in place of ad hoc prohibitions or descriptions of unreasonable price.

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[43]Letter from the Council of Defense and Space Industry Associations, to Donald M. Freedman, Executive Secretary, DoD Advisory Panel, dated August 11, 1992.

[44]*See Administrator, Veterans Administration,* 36 Comp. Gen. 718 (1957) (debarment requires "bad faith" use of foreign materials); *Secretary of the Army,* 39 Comp. Gen. 599 (1960) (debarment requires knowing violation of Act); *Harold P. Donz,* 42 Comp. Gen. 401 (1963) (debarment appropriate only where there is "some degree of culpability . . ., and not in cases of bona fide misunderstanding or inadvertence").

[45] FAR 9.406-2, 9.407-2.

Repeal 10 U.S.C. § 2327. Contracts: Consideration of National Security Objectives

The Panel has established a requirement for considering national security in its recommended new paragraph 2x11(a)(9), discussed above, which provides that national security objectives be considered in the award of DOD contracts for the purchase of foreign goods. The Panel recommends that new paragraph 2x11(a)(9), as supplemented by the provisions of the Defense Authorization Act of 1993 previously discussed, makes section 2327 redundant.

7.1.1. 41 U.S.C. §§ 10a through 10d; miscellaneous Public Laws

Buy American Act
Domestic Source Restrictions
Domestic Product Preferences

7.1.1.1. Summary of the Law

Sections 10a to 10d of Title 41 (The Buy American Act of 1933) implement a policy preference for goods produced or manufactured in the United States by affecting access of foreign made goods to the U.S. Government procurement market. The Act requires that domestic end products be procured for public use except where: (a) inconsistent with the public interest; (b) the cost is unreasonable; (c) they are procured for use outside the United States; or (d) they are not commercially available in the required quantity or quality within the United States.[1] The Act specifically applies to supplies and materials used in contracts for public works.[2]

To qualify as a domestic end product, under Executive Order, an unmanufactured product must have been mined or produced in the United States; or in the case of a manufactured product, the cost of its qualifying country and U.S. components must exceed 50 percent of the cost of all its components.[3] By adding a price differential to foreign product offers, the Act's provisions do not exclude such goods from the U.S. Government procurement market; but rather, only affect the evaluation of such goods in comparison to domestic end products.[4]

Over the years, various Defense Authorization and Appropriation Acts have placed "buy American" restrictions in Government procurement of specific products, effectively precluding some foreign sources.[5] Under delegated authority from the President, DOD imposes similar restrictions on certain items of defense equipment for mobilization purposes and to bolster the defense industrial base. As Canada participates with the United States in a North American Defense Industrial Preparedness Program, those restrictions are not applicable to Canada.[6]

7.1.1.2. Background of the Law

The Buy American Act was enacted during a period of economic depression and isolationism and was preceded by the Smoot-Hawley Tariff Act of 1930, which raised tariffs to the highest rates in U.S. history. The socioeconomic objective behind both statutes was a desire to increase domestic employment and to raise the incomes of U.S. manufacturers by encouraging

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[1] 41 U.S.C. § 10a.
[2] 41 U.S.C. § 10b.
[3] Exec. Order No. 10582 (Dec. 17, 1954 as amended); DFARS 225.000-70 and 252.225-7001.
[4] FAR 25.303; DFARS subpart 225.1.
[5] DFARS subpart 225.70; and note 20 *infra*.
[6] DFARS subpart 225.71.

the use of domestic goods.[7] Other than an amendment exempting certain functions under the Foreign Assistance Act of 1961,[8] the Buy American Act has remained the standard-bearer for domestic preference legislation.

In the 1960s, however, under the aegis of "Buy American," DOD further strengthened domestic source preferences by placing a 50 percent balance of payments price differential on foreign goods.[9] Although established as an interim measure to stem the outflow of gold from the United States, the initiative has since provided the genesis for the DOD Balance of Payments Program.[10] Originally intended to apply only to those products procured by the United States for use outside the country, the price differential has since expanded to include the procurement of all foreign goods which result in dollars being expended abroad.

With the enactment of the Trade Agreements Act of 1979 (TAA), the President was permitted to waive Buy American Act provisions for certain designated countries based on adherence to the General Agreement on Tariffs and Trade (GATT) Agreement on Government Procurement.[11] The Agreement permits signatory countries to compete for U.S. Government procurement of eligible products without regard to Buy American Act provisions above a specified dollar threshold as set by the United States Trade Representative (USTR). Eligible products,[12] as well as Government agencies within each country covered by the TAA,[13] are set forth in Annexes to the TAA. Purchases under small business and socially disadvantaged business preference programs are exempt from TAA application.

The Buy American Act of 1988, part of the Omnibus Trade and Competitiveness Act of 1988,[14] now restricts the use of Presidential waiver authority in the procurement of goods or services of foreign origin under the TAA, specifically where: (a) a designated country is not in good standing under the Agreement; (b) a designated country maintains a significant and persistent pattern or practice of discrimination against U.S. products resulting in identifiable harm to U.S. businesses; or (c) procuring the services of any contractor or subcontractor from countries identified under (a) and (b).[15]

7.1.1.3. Law in Practice

The Buy American Act provides for a price differential of either 6 or 12 percent to be applied to foreign source products. In contrast, DOD places a price differential of 50 percent on

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[7]Secretary of Defense, A Report to the United States Congress On The Impact of Buy American Restrictions Affecting Defense Procurement, Department of Defense (July 1989), at E-4.
[8]22 U.S.C. § 2393 note; Exec. Order No. 11223 (May 12, 1965 as amended).
[9]Memorandum from Secretary of Defense Robert S. McNamara to the Secretaries of the Military Departments "Supplies and Services for Use Outside the United States" (July 16, 1962).
[10]Stamps, Robert, The Department of Defense Balance of Payments Program: A Brief History and Critique, at 535.
[11]19 U.S.C. § 2503.
[12]DFARS 225.403-70.
[13]FAR 25.406.
[14]Pub. L. No. 100-418, 102 Stat. 1545.
[15]41 U.S.C. § 10b-1.

such goods.[16] Years of practice under the Buy American Act has resulted in repeated requests for authorized waivers to the price differential. For example, blanket waivers of Buy American are in place under reciprocal procurement memoranda of understanding designed to promote the concept of cooperation in NATO and allied defense procurement.[17] Although the Buy American Act excludes from its application the procurement of products for use outside the United States, DOD's Balance of Payments Program applies a price differential to all procurement of foreign supplies and services resulting in dollar expenditures outside the United States. As reported to Congress by the Secretary of Defense:

> In order to maintain consistency in the application of its Balance of Payments program differential, DOD applies the Act differently by covering all purchases, even those for use outside the United States, rarely using the statutory exemption for such procurement. Thus, while implementation of the Buy American Act does not necessarily result in an outright prohibition on acquisition of foreign products, foreign sources (especially in non-designated countries) are often placed at a major competitive disadvantage, both at the prime contract level and as suppliers of components.[18]

Since the advent of the TAA, DOD's implementation of the Act has placed some domestically manufactured products at a competitive disadvantage under TAA rules of origin in the qualification of a product as a domestic end product. The TAA test is one of "substantial transformation," versus the Buy American Act's test of "50 percent of component cost," creating the anomaly of a U.S. domestic manufactured product being competitively disadvantaged under the latter application.[19]

The practice of legislating domestic source restrictions on Government procurement of designated products through annual Defense Authorization and Appropriations Acts, under the auspices of the Buy American Act, has over the years encompassed many different sectors and classes of products, such as: transportation by ocean vessels and by air carriers; food, clothing, fabrics, specialty metals, and hand or measuring tools; construction of major components of the hull and superstructure of naval vessels, and repair and maintenance of naval vessels; circuit breakers for naval vessels; multipassenger motor vehicles (buses) and administrative motor vehicles; R&D contracting; aircraft ejection seats and night vision devices; transfer of large-caliber cannon production technology; coal or coke; floating storage of petroleum; 120mm mortars and ammunition; Strategic Defense Initiative contracts; valves and machine tools, anchor and mooring chain; certain chemical weapons antidote; supercomputers; sonobuoys; ball bearings and roller bearings; and PAN carbon fibers. Furthermore, under authority of the National Security Act of

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[16]FAR 25-105(a).
[17]10 U.S.C. § 2457.
[18]Note 7, *supra*.
[19]Office of Federal Procurement Policy, Buy American Act: A Study of Alternatives to the Rule of Origin, Report to Congress (Dec. 1990).

1947[20] and the Defense Production Act of 1950,[21] the Secretary of Defense and the Services have placed similar restrictions on other sectors and classes of products.[22]

In response to a request in the 1989 Defense Authorization Act for a report on the impact of statutory Buy American restrictions affecting defense procurement, the Secretary of Defense formulated specific Buy American Act recommendations including: (a) abolish most Congressionally mandated restrictions; (b) avoid future use of Buy American restrictions; and (c) rely on the authority of the Office of Secretary of Defense.[23] However, as well as renewing previous Buy American source restrictions, legislation enacted since the DOD Report has continued the practice of placing new Buy American source restrictions on government procurement.[24]

7.1.1.4. Recommendations and Justification

As stated above, the Panel's primary recommendation is that statutory domestic source restrictions applicable to DOD acquisition be reduced and restated in a more comprehensive way. To the extent that the provisions permit waiver and exemptions, there is great disparity in the circumstances permitting such waivers and the procedures for waiving a statutory prohibition on foreign sources.[25] Finally, the Secretary has found that the current restrictions do little to further the U.S. industrial base, but do much harm in delaying procurement actions, precluding DOD access to important new technologies, and generally raising the price DOD must pay for the goods and services it buys.[26] The Panel further recommends that the restatement apply specifically to DOD and be in a new subchapter of Title 10 as part of a more general chapter on Defense Trade and Cooperation. A subchapter applicable only to DOD is justified because the considerations applicable to source restrictions for defense products and services are different from those applicable to most (perhaps all) civilian agencies.

The text of the Panel's primary recommendation can be found in subchapter 7.4, which distributes portions of the Buy American Act into proposed sections 2x10 through 2x15, which also adds defense technology and industrial base and national security issues into the establishment of domestic source restrictions. If this consolidation were not done, then the following changes would need to be made to the Buy American Act itself:

> **Amend section 10a and subsection 10b(a) by striking the phrase "substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States," and inserting the phrase "or substantially**

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[20] 50 U.S.C. § 404.
[21] 50 U.S.C. App. 2061 *et seq.*
[22] DFARS Part 208.
[23] Note 12, *supra*, at 12-3.
[24] *See* Pub. L. No. 102-702, section 8027A, concerning contractor participation in the secondary Arab boycott of Israel; and the 1993 Defense Authorization Act, section 813, concerning procurement limitations on fuel cells.
[25] Note 7, *supra*.
[26] *Id.*, at pgs. 7-10.

transformed" between the word "manufactured" and the phrase "in the United States."

This change is necessary to conform the Buy American Act rule of origin determination to that in the TAA. Under the authority of the TAA and within its threshold, the United States designates those countries which provide reciprocity to U.S. producers in accordance with the requirements of the TAA, and for which domestic preference of the Buy American Act is waived. The TAA rule of origin requires a test of "substantial transformation" to determine the eligibility of foreign qualifying products. However, because the TAA does not modify the definition of "domestic end product" as contained in the Buy American Act, commercial products which are manufactured in the United States are being placed at a competitive disadvantage to certain foreign source products.[27]

The proposed amendment echoes the intent of the Office of Federal Procurement Policy's "Buy American Act Amendment of 1992" and Report by eliminating the application of the Buy American Act "50 percent component cost" rule in defining a domestic end product.

Amend section 10b by deleting subsection (b); striking the phrase "blacklisting contractors violating requirements" in the section heading; and deleting subsection heading (a).

The Panel recommends repeal of the debarment provisions found in subsection 10b(b). These provisions, while seemingly absolute, have been interpreted to apply only where there is a knowing and willful violation of the Buy American Act.[28] Since regulatory suspension and debarment procedures are also triggered by a knowing and willful breach of contract, or a false representation,[29] there is no need for a statutory procedure.[30]

Amend section 10c by adding subsection "(d) The term 'substantially transformed' has the meaning given such term by section 2518(4)(B) of Title 19."

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[27]Office of Federal Procurement Policy, Statement in Explanation of The Buy American Act Amendment of 1992 (Proposed).

[28]*See Administrator, Veterans Administration*, 36 Comp Gen. 718 (1957) (debarment requires "bad faith" use of foreign materials); *Secretary of the Army*, 39 Comp. Gen. 599 (1960) (debarment requires knowing violation of Act); *Harold P. Danz*, 42 Comp. Gen. 401 (1963) (debarment appropriate only where there is "some degree of culpability . . ., and not in cases of bona fide misunderstanding or inadvertence").

[29] FAR 9.406-2, 9.407-2.

[30]*Note also* the recently enacted 10 U.S.C. § 2410f, Debarment of persons convicted of fraudulent use of 'Made in America' labels, providing that:(a) If the Secretary of Defense determines that a person has been convicted of intentionally affixing a label bearing a 'Made in America' inscription to any product sold in or shipped to the United States that is not made in America, the Secretary shall determine, not later than 90 days after determining that the person has been so convicted, whether the person should be debarred from contracting with the Department of Defense. If the Secretary determines that the person should not be debarred, the Secretary shall submit to Congress a report on such determination not later than 30 days after the determination is made. (b) For purposes of this section, the term 'debar' has the meaning given that term by section 2393(c) of this title.
[Pub. L. No. 102-484, §834, 106 Stat. 2442.]

This amendment completes the first amendment stated above by adding a cross reference to the definition of "substantially transformed" in the TAA.

Retain the following Congressionally mandated domestic source restrictions:

- **Repair and Maintenance of Naval Vessels [Pub. L. No. 101-511, § 8043].**
- **Sonobuoys [Pub. L. No. 102-484, § 833].**

Consistent with Chapter 7.1.5, below, the consolidated subchapter on source restrictions codifies a number of provision which currently appear only in public laws.[31] The Panel recommended retention of the above restrictions because they were created or amended by Congress in the Defense Authorization Act for FY93 and appear to strike a balance among cost considerations, preservation of the defense industrial base, and the maintenance of operational flexibility.

Repeal the following Congressionally mandated domestic source restrictions and product preferences:

- **Jewel Bearings [Pub. L. No. 90-469 and 101-511, § 8121];**
- **Food, Clothing, Fabrics, Specialty Metals, and Hand or Measuring Tools [Pub. L. No. 97-377, § 723];**
- **Night Vision Devices [Pub. L. No. 101-511, § 8054];**
- **Floating Storage of Petroleum [Pub. L. No. 101-511, § 8020];**
- **Anchor and Mooring Chain [Pub. L. No. 100-202, § 8125, 101-165, § 9051, and 101-511, § 8041];**
- **PAN Carbon Fibers [Pub. L. No. 101-511, § 8048].**

Consistent with Chapter 7.1.5, below, the Panel recommended repeal of the above domestic source restrictions and product preferences enacted in annual authorization and appropriation acts as necessary to reinforce the United States' commitment to unrestrained global trade; unless Congress specifically enacts such restrictions or preferences in support of the national defense technology and industrial base by amending new section 2x12, *Items Restricted to American Sources*, in the recommended new chapter on Defense Trade and Cooperation in Title 10.

Additional Streamlining Amendments

In subparagraph 10b-1(g)(2)(A) strike the phrase "after conducting one or more public hearings at which interested parties may present comments. Sections 556 and 557 of title 5,

[31]The Panel has not codified the recent restriction on purchases of ball bearings and roller bearings contained in Pub. L. No. 102-484, § 832, 106 Stat. 2442. This provision is already in the DFARS and expires at the end of FY95.

United States Code, shall not apply to the conduct of any such hearing."

In subparagraph 10b-1(g)(2)(B), after the words "and rules that" strike the phrase ", to the extent the Administrator considers appropriate and consistent with the applicability of such policy guidance to all services (other than construction services), is" and replace with the word "are."

Strike subparagraph 10b-1(g)(2)(C) in its entirety.

Strike subsection 10b-2(b) in its entirety, renumbering subsection (c) to "(b)."

The above streamlining amendments reflect the deletion of statutory references to mandated Office of Federal Procurement Policy and Secretary of Defense Reports already completed and delivered, or due for delivery at the conclusion of this Panel's Report, to Congress.

7.1.1.5. Relationship to Objectives

Amendment of 41 U.S.C. §§ 10a through 10d, as recommended, would establish a balance between an efficient process, full and open access to the procurement system in international defense trade, while contemporaneously ensuring that the development and preservation of the national defense technology and industrial base is not inhibited.

7.1.1.6. Proposed Statutes

Section 10a. American Materials Required For Public Use

Notwithstanding any other provision of law, and unless the head of the Federal agency concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured or substantially transformed in the United States ~~substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States,~~ shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or of the articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they were manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

Section 10b. Contracts for public works; specification for use of American materials; ~~blacklisting contractors violating requirements~~

~~(a)~~ Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work of the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured or substantially transformed in the United States ~~substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States~~ except as provided in section 10a of this title: *Provided, however,* ~~T~~that if the head of the Federal agency making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as that particular article, material, or supply, and a public record made of the findings which justified the exception.

~~(b) If the head of a Federal Agency which has made any contract containing the provision required by subsection (a) of this section finds that in the performance of such contract there has been a failure to comply with such provisions, he shall make public his findings, including therein the name of the contractor obligated under such contract, and no other contract for the construction, alteration, or repair of any public building or public work in the United States or elsewhere shall be awarded to such contractor, subcontractors, material men, or suppliers with which such contractor is associated or affiliated, within a period of three years after such finding is made public.~~

Sec. 10b-1. Prohibited procurement practices

(a) Federal contracts for goods or services of foreign origin

A Federal agency shall not award any contract-- (1) for the procurement of an article, material, or supply mined, produced, or manufactured-- (A) in a signatory country that is considered to be a signatory not in good standing of the Agreement pursuant to section 2515(f)(3)(A) of title 19; or (B) in a foreign country whose government maintains, in government procurement, a significant and persistent pattern or practice of discrimination against United States products or services which results in identifiable harm to United States businesses, as identified by the President pursuant to section 2515(g)(1)(A) of Title 19; or (2) for the procurement of a service of any contractor or subcontractor that is a citizen or national of a foreign country identified by the President pursuant to section 2515(f)(3)(A) or 2515(g)(1)(A) of Title 19, or is owned or controlled directly or indirectly by citizens or nationals of such a foreign country.

(b) Exceptions to prohibition

The prohibition on procurement in subsection (a) of this section is subject to sections 2515(h) and 2515(j) of Title 19 and shall not apply—(1) with respect to services, articles, procured and used outside the United States and its territories; (2) notwithstanding section 2515(g) of Title 19, to an eligible product of a country which is a signatory country unless that country is considered to be a signatory not in good standing pursuant to section 2515(f)(3)(A) of Title 19; or (3)

notwithstanding section 2515(g) of Title 19, to a country that is a least developed country (as that term is defined in section 2518(6) of Title 19).

(c) Authority of President or Federal agency heads to authorize contracts

Notwithstanding subsection (a) of this section, the President or the head of a Federal agency may authorize the award of a contract or class of contracts if the President or the head of the Federal agency-- (1) determines that such action is necessary-- (A) in the public interest; (B) to avoid the restriction of competition in a manner which would limit the procurement in question to, or would establish a preference for, the services, articles, materials, or supplies of a single manufacturer or supplier; or (C) because there would be or are an insufficient number of potential or actual bidders to assure procurement of services, articles, materials, or supplies of requisite quality at competitive prices; and (2) notifies the Committee on Governmental Affairs of the Senate, as well as other appropriate Senate committees, and the appropriate committees of the House of Representatives, of such determination-- (A) not less than 30 days prior to the date of the award of the contract or the date of authorization of the award of a class of contracts; or (B) if the agency's need for the service, article, material, or supply is of such urgency that the United States would be seriously injured by delaying the award or authorization, not more than 90 days after the date of such award or authorization.

(d) Limitation on authority of Federal agency heads to authorize contracts

The authority of the head of a Federal agency under subsection (c) of this section shall not apply to contracts subject to memorandums of understanding entered into by the DOD (or any military department) and a representative of a foreign country (or agency or instrumentality thereof). In the case of any such contracts, any determinations and notice required by subsection (c) of this section shall be made by-- (1) the President, or (2) if delegated, by the Secretary of Defense or the Secretary of the Army, Navy, or Air Force, subject to review and policy guidance by the organization established under section 1872(a) of Title 19.

(e) Non-delegability of agency heads' authority

The authority of the head of a Federal agency under subsection (c) or (d) of this section may not be delegated.

(f) Other authorities to bar procurement from nondesignated countries not affected

Nothing in this section shall restrict the application of the prohibition under section 2512(a)(1) of Title 19.

(g) Ownership or control of contractors or subcontractors by citizens or nationals of foreign countries

(1) For purposes of this section with respect to construction services, a contractor or subcontractor is owned or controlled directly or indirectly by citizens or nationals of a foreign

country if-- (A) 50 percent or more of the voting stock of the contractor or subcontractor is owned by one or more citizens or nationals of the foreign country; (B) the title to 50 percent or more of the stock of the contractor or subcontractor is held subject to trust or fiduciary obligations in favor of one or more citizens or nationals of the foreign country; (C) 50 percent or more of the voting stock of the contractor or subcontractor is vested in or exercisable on behalf of one or more citizens or nationals of the foreign country; (D) the case of a corporation-- (i) the number of its directors necessary to constitute a quorum are citizens or nationals of the foreign country; or (ii) the corporation is organized under the laws of the foreign country or any subdivision, territory, or possession thereof; or (E) in the case of a contractor or subcontractor who is a participant in a joint venture or a member of a partnership, any participant of the joint venture or partner meets any of the criteria in subparagraphs (A) through (D) of this paragraph. (2)(A) For purposes of this section, except as provided in paragraph (1), a determination of whether a contractor or subcontractor is a citizen or national of a foreign country or is owned or controlled directly or indirectly by citizens or nationals of a foreign country shall be made in accordance with policy guidance prescribed by the Administrator for Federal Procurement Policy ~~after conducting one or more public hearings at which interested parties may present comments. Sections 556 and 557 of title 5, United States Code, shall not apply to the conduct of any such hearing~~. (B) The Administrator shall include in the policy guidance prescribed under subparagraph (A) definitions, procedures, standards, and rules that~~, to the extent the Administrator considers appropriate and consistent with the applicability of such policy guidance to all services (other than construction services), is~~ are the same as or similar to the definitions, procedures, standards, and rules that the Administrator has developed and issued for the administration of section 109 of the Treasury, Postal Service, and General Government Appropriations Act, 1988 (101 Stat. 1329-434). ~~(C) The policy guidance required by subparagraph (A) shall be prescribed not later than 180 days after the date of enactment of this subsection. (3)(A) The Administrator for Federal Procurement Policy shall conduct an assessment of the current rules under this Act for making determinations of country of origin and alternatives to such rules. Such assessment shall identify and evaluate (i) reasonable alternatives to such rules of origin, including one or more alternative rules that require a determination on the basis of total cost, and (ii) the specific cost factors that should be included in determining total cost. (B) In conducting the analysis, the Administrator shall consult and seek comment from representatives of United States labor and business, other interested United States persons, and other Federal agencies. The Administrator shall hold public hearings for the purpose of obtaining such comment, and a transcript of such hearings shall be appended to the report required by subparagraph (C). (C) A report on the results of the analysis shall be submitted to the appropriate committees of the House of Representatives and to the Committee on Governmental Affairs and other appropriate committees of the Senate not later than 18 months after the date of enactment of this subsection. Such report shall include proposed policy guidance or any recommended legislative changes on the factors to be used in making determinations of country of origin.~~

(h) Definitions

As used in this section-- (1) the term "Agreement" means the Agreement on Government Procurement as defined in section 2518(1) of Title 19; (2) the term "signatory" means a party to

the Agreement; and (3) the term "eligible product" has the meaning given such term by section 2518(4) of title 19.

Sec. 10b-2. Limitation on authority to waive Buy American Act requirement

(a) Determination by the Secretary of Defense.--(1) If the Secretary of Defense, after consultation with the United States Trade Representative, determines that a foreign country which is party to an agreement described in paragraph (2) has violated the terms of the agreement by discriminating against certain types of products produced in the United States that are covered by the agreement, the Secretary of Defense shall rescind the Secretary's blanket waiver of the Buy American Act with respect to such types of products produced in that foreign country. (2) An agreement referred to in paragraph (1) is any reciprocal defense procurement memorandum of understanding between the United States and a foreign country pursuant to which the Secretary of Defense has prospectively waived the Buy American Act for certain products in that country. ~~(b) Report to Congress.--The Secretary of Defense shall submit to Congress a report on the amount of Department of Defense purchases from foreign entities in fiscal years 1992 and 1993. Such report shall separately indicate the dollar value of items for which the Buy American Act was waived pursuant to any agreement described in subsection (a)(2), the Trade Agreement Act of 1979 (19 U.S.C. 2501 et seq.), or any international agreement to which the United States is a party. (c)~~ (b) Buy American Act Defined.--For purposes of this section, the term "Buy American Act" means Title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved March 3, 1933 (41 U.S.C. § 10a et seq.).

Section 10c.

Definition of terms used in sections 10a to 10c

When used in sections 10a to 10c of this title-

(a) The term "United States," when used in a geographical sense, includes the United States and any place subject to the jurisdiction thereof;

(b) The terms "public use," "public work" shall mean use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands;

(c) The term "Federal agency" has the meaning given such term by section 472 of Title 40, which includes the Departments of the Army, Navy, and Air Force;

(d) The term "substantially transformed" has the meaning given such term by section 2518(4)(B) of Title 19.

STATEMENT OF

RICHARD H. HOPF

ASSOCIATE ADMINISTRATOR FOR ACQUISITION POLICY

GENERAL SERVICES ADMINISTRATION

BEFORE THE SUBCOMMITTEE ON

PUBLIC BUILDINGS AND GROUNDS

OF THE COMMITTEE ON

PUBLIC WORKS AND TRANSPORTATION

HOUSE OF REPRESENTATIVES

WEDNESDAY, JUNE 16, 1993

GOOD MORNING MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE. IT IS MY PLEASURE TO APPEAR HERE TODAY TO PRESENT TESTIMONY ON THE BUY AMERICAN ACT (BAA), AS AMENDED.

IT IS MY UNDERSTANDING THAT THE SUBCOMMITTEE HAS A NUMBER OF QUESTIONS RELATED TO THE REQUIREMENTS OF THE BAA AND ITS IMPLEMENTATION BY EXECUTIVE AGENCIES. AS A PREFACE TO THOSE QUESTIONS, IT MAY BE HELPFUL TO PROVIDE SOME BACKGROUND INFORMATION ON THE BAA, ITS PURPOSE, HISTORY, AND IMPLEMENTATION ISSUES.

THE BAA WAS ENACTED OVER SIXTY YEARS AGO TO ESTABLISH A GENERAL PREFERENCE FOR THE ACQUISITION OF DOMESTICALLY PRODUCED "ARTICLES, MATERIALS, AND SUPPLIES" WHEN THEY ARE PURCHASED BY THE GOVERNMENT FOR PUBLIC USE IN THE UNITED STATES. THE BAA WAS A PRODUCT OF THE DEPRESSION ERA AND WAS INTENDED TO SAVE AND CREATE JOBS FOR AMERICAN WORKERS AND TO PROTECT DOMESTIC INDUSTRY. THE BAA ALSO APPEARS TO HAVE BEEN, IN PART, A RETALIATORY MEASURE AGAINST DOMESTIC PREFERENCE POLICIES THEN IN EFFECT IN OTHER NATIONS.

THE BAA HAS SEPARATE PROVISIONS APPLICABLE TO SUPPLY AND CONSTRUCTION CONTRACTS. BOTH PROVISIONS FOCUS ON THE PLACE OF PRODUCTION OR MANUFACTURE AS OPPOSED TO THE NATIONALITY OF THE

PRODUCER OR CONTRACTOR. UNDER SUPPLY CONTRACTS, THE REQUIREMENTS OF THE BAA APPLY TO THOSE THINGS DIRECTLY PURCHASED BY A FEDERAL AGENCY. IN CONSTRUCTION CONTRACTS THEY APPLY TO THE CONSTRUCTION MATERIALS PURCHASED BY A FEDERAL CONTRACTOR OR SUBCONTRACTOR FOR INCORPORATION IN A PUBLIC BUILDING OR WORK.

WITH RESPECT TO SUPPLIES, THE BAA STATES THAT UNMANUFACTURED ARTICLES OR MATERIALS PURCHASED FOR PUBLIC USE IN THE UNITED STATES MUST HAVE BEEN MINED OR PRODUCED IN THE UNITED STATES. MANUFACTURED ARTICLES, MATERIAL, AND SUPPLIES PURCHASED FOR PUBLIC USE MUST HAVE BEEN MANUFACTURED IN THE UNITED STATES SUBSTANTIALLY ALL FROM COMPONENTS THAT HAVE, THEMSELVES, BEEN MINED, PRODUCED, OR MANUFACTURED IN THE UNITED STATES.

WITH RESPECT TO CONSTRUCTION, THE BAA DIRECTS FEDERAL AGENCIES TO INCLUDE A CONTRACT CLAUSE IN CONSTRUCTION AND REPAIR AND ALTERATION CONTRACTS WHICH PLACES SIMILAR REQUIREMENTS ON THE CONTRACTOR AND ITS SUBCONTRACTORS.

CONGRESS RECOGNIZED THAT THE BAA'S REQUIREMENTS MAY IMPAIR THE ABILITY OF AN AGENCY TO EFFICIENTLY AND ECONOMICALLY PROCURE THOSE THINGS IT NEEDS TO ACCOMPLISH ITS MISSION. ACCORDINGLY, THE BAA PROVIDES A NUMBER OF EXCEPTIONS TO APPLICATION OF ITS PROSCRIPTIONS.

FIRST, BAA REQUIREMENTS WILL NOT APPLY IF A NEEDED ARTICLE, MATERIAL OR SUPPLY IS NOT MINED, PRODUCED, OR MANUFACTURED IN SUFFICIENT AND REASONABLY AVAILABLE COMMERCIAL QUANTITIES OF SATISFACTORY QUALITY. SECOND, AN AGENCY MAY WAIVE THE BAA REQUIREMENTS IF IT FINDS THAT THEIR APPLICATION WILL BE INCONSISTENT WITH THE PUBLIC INTEREST. FINALLY, AN AGENCY MAY ALSO WAIVE THE BAA PROVISION IF THEIR APPLICATION WOULD UNREASONABLY INCREASE THE COSTS OF THE ARTICLE'S PROCUREMENT.

THE BAA HAS BEEN IMPLEMENTED WITHIN THE EXECUTIVE BRANCH BY EXECUTIVE ORDER AND REGULATIONS. IT'S APPLICATION IN INDIVIDUAL CONTRACTS HAS ALSO BEEN THE SUBJECT OF NUMEROUS OPINIONS AND DECISIONS OF THE COMPTROLLER GENERAL, BOARDS OF CONTRACT APPEALS, AND THE FEDERAL COURTS WHICH HAVE SERVED TO FURTHER DEFINE THE SPECIFICS OF THE BAA'S APPLICATION.

THE HIGHEST STATEMENT OF DIRECTION FOR BAA IMPLEMENTATION WITHIN THE EXECUTIVE BRANCH IS PROVIDED BY EXECUTIVE ORDER. THREE ORDERS HAVE IMPLEMENTED ITS PROVISIONS. THE MOST SIGNIFICANT IS EXECUTIVE ORDER 10582, SIGNED IN 1954. THE ORDER WAS INTENDED TO PROVIDE UNIFORM GUIDANCE REGARDING THE BAA EXCEPTIONS FOR UNREASONABLE COST AND INCONSISTENCY WITH THE PUBLIC INTEREST. INCIDENTALLY, THE ORDER ALSO ADDRESSED A CRITICAL ISSUE RELATING TO THE DETERMINATION OF AN OFFERED ITEM'S ORIGIN.

WITH RESPECT TO THE LATTER ISSUE, THE ORDER EFFECTIVELY DEFINED WHAT IS MEANT BY THE STATUTORY TERM "SUBSTANTIALLY ALL" IN APPLYING THE SECOND TIER OF THE ORIGIN TEST APPLICABLE TO MANUFACTURED ITEMS. THUS, IN ACCORDANCE WITH THE ORDER, A MANUFACTURED ITEM WILL NOT BE CONSIDERED DOMESTIC IF THE COST OF FOREIGN COMPONENTS USED IN THE ITEM IS FIFTY PERCENT OR GREATER THAN THE COST OF ALL COMPONENTS USED IN THE ITEM.

WITH RESPECT TO THE UNREASONABLE COST EXCEPTION TO BAA APPLICATION, THE ORDER PROVIDED THAT THE COST OF ITEMS OF DOMESTIC ORIGIN WILL BE DETERMINED UNREASONABLE, AND THE PROCUREMENT OF SUCH ITEMS CONTRARY TO THE PUBLIC INTEREST IF THE PRICE OF AN OFFERED DOMESTIC ITEM EXCEEDS THE PRICE OF AN OFFERED FOREIGN ITEM PLUS A DIFFERENTIAL. THE DIFFERENTIAL WAS ESTABLISHED AT SIX PERCENT OF THE OFFERED PRICE OF THE FOREIGN ITEM.

THE ORDER FURTHER PROVIDED THAT IT WAS NOT INTENDED TO IMPAIR AN AGENCY'S AUTHORITY TO REJECT AN OFFER FOR OTHER REASONS OF NATIONAL INTEREST OR NATIONAL SECURITY, OR TO ESTABLISH DIFFERENT RULES TO PROMOTE SMALL BUSINESS OR LABOR SURPLUS POLICY. ADDITIONALLY, THE ORDER PRESERVED THE RIGHT OF AN AGENCY HEAD TO ESTABLISH A GREATER DIFFERENTIAL THAN PROVIDED BY THE ORDER UNDER CERTAIN CONDITIONS.

FEDERAL ACQUISITION REGULATIONS REFLECT THE PROVISIONS OF EXECUTIVE ORDER 10582. A MANUFACTURED ARTICLE WILL BE CONSIDERED A "DOMESTIC END ITEM" FOR BAA PURPOSES ONLY IF (1) IT IS MANUFACTURED IN THE UNITED STATES AND (2) THE COST OF ITS DOMESTIC COMPONENTRY EXCEEDS FIFTY PERCENT OF THE COST OF ALL ITS COMPONENTRY. COSTS INCLUDE TRANSPORTATION COSTS AS WELL AS APPLICABLE DUTY.

PROCUREMENT REGULATIONS FURTHER PRESCRIBE THAT THE FOREGOING ORIGIN TEST IS, IN THE CASE OF SUPPLIES, TO BE APPLIED TO THE FINISHED "END PRODUCT." HOWEVER, FOR CONSTRUCTION MATERIALS, THE TEST IS APPLIED TO THE MATERIALS BROUGHT TO THE CONSTRUCTION SITE FOR INCORPORATION IN THE PUBLIC WORK OR BUILDING.

THE REGULATIONS FURTHER REFLECT THE EXECUTIVE ORDER'S GUIDELINES ON UNREASONABLE COST. AGENCIES ARE REQUIRED TO ADD A PERCENTAGE TO THE PRICE, INCLUSIVE OF DUTY, OF THE LOW ACCEPTABLE OFFER OF A FOREIGN ITEM AND THEN COMPARE THAT TOTAL TO THE PRICE OF AN OFFERED DOMESTIC ITEM. CONSISTENT WITH THE EXECUTIVE ORDER, THE PERCENTAGE IS NORMALLY SIX PERCENT, EXCEPT THAT A TWELVE PERCENT DIFFERENTIAL MAY BE APPLIED IN THE CASE OF SUPPLIES WHERE THE OFFEROR OF THE DOMESTIC PRODUCT IS A SMALL BUSINESS OR IS LOCATED IN A LABOR SURPLUS AREA. THE DEPARTMENT OF DEFENSE HAS PRESCRIBED A FIFTY PERCENT DIFFERENTIAL FOR USE IN ITS SUPPLY CONTRACTS.

ALTHOUGH THE BAA WOULD APPEAR ON ITS FACE TO BE STRAIGHTFORWARD, IT HAS BEEN, IN PRACTICE, DIFFICULT TO IMPLEMENT, ADMINISTER AND INTERPRET. ISSUES FREQUENTLY ARISE CONCERNING THE CORRECT APPLICATION OF THE BAA, PARTICULARLY WITH RESPECT TO APPLYING THE EXCEPTIONS TO THE ACT AND IN DETERMINING THE DOMESTIC OR FOREIGN ORIGIN OF AN OFFERED PRODUCT INCLUDING SUCH SUBSIDIARY QUESTIONS AS WHAT CONSTITUTES MANUFACTURE, WHAT IS AN END PRODUCT OR CONSTRUCTION MATERIAL VERSUS WHAT IS A COMPONENT, AND WHEN IS THE DETERMINATION MADE?

IN RECENT YEARS, BAA CONSIDERATIONS HAVE BECOME EVEN MORE COMPLEX DUE TO THE PROLIFERATION OF LAWS, TREATIES, AND MEMORANDA OF UNDERSTANDING WITH FOREIGN GOVERNMENTS RELATING TO DOMESTIC PREFERENCE POLICIES. SOME OF THESE PROVISIONS ARE INTENDED TO BOLSTER PROTECTIONIST POLICIES WHILE OTHERS, SUCH AS THE TRADE AGREEMENTS ACT AND THE CANADA FREE TRADE ACT ARE INTENDED TO CARVE OUT EXCEPTIONS, IN PART, TO THEIR APPLICATION. SOME OF THE PROVISIONS ARE BROAD IN THE SCOPE OF THEIR COVERAGE, WHILE OTHERS ARE NARROWLY APPLIED TO SPECIFIC PRODUCTS OR COUNTRIES OF ORIGIN. SOME OF THE PROVISIONS REFLECT EXISTING RULES OF ORIGIN, WHILE OTHERS INTRODUCE NEW CONCEPTS. AS A CONSEQUENCE, THE BODY OF RULES AFFECTING FOREIGN ACQUISITIONS ARE COMPLEX AND DYNAMIC. ALTHOUIGH THIS IS UNDERSTANDABLE, GIVEN THE VOLATILE NATURE OF INTERNATIONAL TRADE ISSUES, THE SUBJECT PRESENTS DIFFICULT

CHALLENGES TO FEDERAL PROCURING ACTIVITIES AND THE CONTRACTORS THEY DO BUSINESS WITH.

I WOULD BE PLEASED TO ANSWER ANY QUESTIONS YOU MAY HAVE.

ISBN 0-16-041688-4